American Bar Association Journal

July 1950

VOLUME 36 • NUMBER 7

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but Post *is a newspaper*

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Contents

JULY, 1950

In This Issue

Judge John J. Parker Restates His Faith in Freedom Under Law

When Judge John J. Parker of the United States Court of Appeals for the Fourth Circuit was asked to deliver one of the Harlan Fiske Stone Lectures at Amherst College, he spoke on his favorite theme—"Liberty and Law". In times when the personal freedom that we have come to take for granted is challenged by totalitarian philosophies of communism and socialism, Judge Parker's statement of the rôle of law in a free society is a summary of the legal philosophy of one of our finest jurists. (Page 523.)

Frank E. Cooper Writes of Michigan Administrative Law

This is the study of state administrative law that won the essay competi- Bar takes issue with those who administrative Law in 1949. Mr. Cooper's first prize of $1,500 describing the attitude of the Michigan Supreme Court toward the problems of administrative law is not his first successful contest entry. He won the 1942 Ross Essay Prize, awarded annually by the Association. (Page 527.)

Sol M. Linowitz Replies to W. T. Holliday

Sol M. Linowitz of the New York Bar takes issue with those who advocate an immediate establishment of world government. The difficulties of such an attempt, he declares, can be judged by the difficulty that our own nation experienced when the Constitution was in the process of being ratified by the original thirteen states—states that had a common language and a common background. He fears that any attempt to create a world government now will result in a failure that will make any international order impossible. This article is a reply to W. T. Holliday's article entitled "World Law or World Anarchy: The Case for World Government", appearing in the August, 1949, issue of the JOURNAL (35 A.B.A.J. 641). (Page 531.)

Eugene C. Gerhart Urges Study of Facts

Roman lawyers had a proverb: *Ex facto oritur jus,* the law arises out of fact. Eugene C. Gerhart uses this as the motto for his article stating the necessity for learning the facts of a legal situation before trying to apply the law. He cites Justice Brandeis as the finest example of an advocate whose insistence upon mastery of facts made him famous. Although Jefferson called it "drudgery", and many lawyers will probably agree, Mr. Gerhart points out that it is necessary drudgery that is too often neglected by busy lawyers. (Page 533.)

American Criminal Law as It Is Taught in Russia

This is a translation by Serge S. Gorny, a recent graduate of the University of Washington School of Law, from an official textbook on criminal law published in the Soviet Union for the use of Russian law students. The American reader will have no trouble in seeing the distortions of the "Party line" in the translation. He may, for example, be surprised to learn that the system of indefinite sentences is "highly reactionary" and means "virtually life imprisonment . . . or a surreptitious form of execution by slow death", or that laws increasing punishments for repeated crimes are used only against "the petty and the accidental thief" (Page 542.)

Glenn R. Winters Gives Suggestions for Improving Organized Bar Work

If the legal profession is to continue to offer and improve the kind of service that it gives to the public, the organized Bar—the local, state and national bar associations—must constantly seek to improve themselves and the work they do.That work is the duty of every lawyer, not merely of the few that are presidents of bar associations and chairmen of bar association committees. This might well be the theme of Glenn R. Winters' article "Bar Association Activities: Suggestions for Bar Association Executives" in this issue. Mr Winters has drawn from the files of applications for the American Bar Association Award of Merit suggestions that every bar association can use in its own work. (Page 546).

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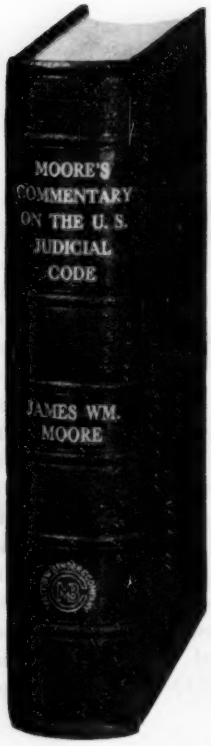

MOORE'S COMMENTARY

on the

U. S. JUDICIAL CODE

by Professor James Wm. Moore, Professor, Yale University, and Special Consultant in the Revision of Title 28 and the Preparation of the New Judicial Code of 1948.

From the Yale Law Review

". . . written in a style admirably adapted to the matter—terse, clear and forthright. Its contents make it invaluable not only to practitioners but to scholars as an interpreter of the new Code. The volume is the first resort for ready search on the history and organization of the Federal Court system and the background and effect of the more important Code provisions. The discussion of the following topics is especially enlightening and readable: Salient Features of the Code; Resume of Changes; Venue and Forum *Non Conveniens*; Removal; and A Survey of *Erie* v. *Tompkins*. Outstanding here are the masterly survey of the effect of *Erie* on the Rules and the useful reconnaissance of Federal Common Law.

"It well may be that for another quarter-century our Federal system through the Rules of Civil Procedure and the new Judicial Code will furnish the most influential guidance in the Anglo-American world for progress in court procedure. If this should be so, Moore through his realistic but forward-looking work as consultant, as writer of the leading treatise in the field and now of this Commentary on the Code, will have to be credited with a strong assist."

A Comment by U. S. Circuit Judge John J. Parker

"This is a comprehensive and clearly written treatise on the Revised Judicial Code from the pen of the able and scholarly Professor James Wm. Moore of Yale University, author of the well known work on Federal Procedure and one of the consultants who aided in the drafting of the Revised Code. It is hardly necessary to say that the work has been thoroughly and painstakingly done and that the result is an illuminating and authoritative commentary on a subject of the greatest importance to lawyers and judges.

"In writing this treatise to explain not only the changes made by the Revised Code but also the reason and purpose which underlie all of its provisions, Prof. Moore has added to the already heavy debt of gratitude owed him by the profession for his labors in the field of federal jurisdiction and procedure."

From the Vanderbilt Law Review

"All of his work has been noteworthy for its superior quality, accuracy and thoroughness. The *Commentary* is no exception. The book is noteworthy for its broad and complete coverage. It not only explains the changes made in the law by the new Code but also brings the reader up to date on the general field of the jurisdiction of the federal courts.

"It is invaluable as a means of reviewing and refreshing one's knowledge of the subject as well as a source for the clarification of the recent changes which have been made. While the book is sufficiently lengthy to cover the subject matter, it is not too long (684 pages) to read entirely in order to review the field, including the most recent developments. It is recommended with confidence and enthusiasm."

From the Pennsylvania Law Review

"About a decade ago when the *Erie* case and the Federal Rules of Civil Procedure turned the world of the federal judge and practitioner topsy-turvy, the greatest help in adjusting to the new order came from Professor James William Moore in his 3-volume Treatise. In the intervening years his influence upon decisions interpreting the Rules has been unique. It is a rare case reported in Federal Rules Decisions that does not cite Moore.

"An Act 'To revise, codify, and enact into law title 28 of the U. S. Code became effective September 1, 1948 . . . here, too, the profession needs and will welcome Moore's guiding hand. Moore, as special consultant to the Revisers, is in an unusually favorable position to give the further illumination which is needed. His Commentary is a coherent, scholarly, integrated text. It assumes elementary knowledge of the Federal Judicial System, and it probes deeply into selected problems."

From the Virginia Law Review

"This reviewer believes the legal profession will owe a further debt of gratitude to Professor Moore for the scholarly volume under review . . . the heart of the book will be found in the extended discussion of the changes in federal procedure brought about by the Code of 1948. Very carefully and accurately, too, are indicated the rather important changes made as to the removal of cases from state to federal courts and Professor Moore's treatment of these is particularly deserving of high praise . . . One feature must not be overlooked even in a brief review—the treatment of the most important recent decisions of the Supreme Court and their precise place, when viewed against the background of the new Code. Here, again, Professor Moore has rung the bell."

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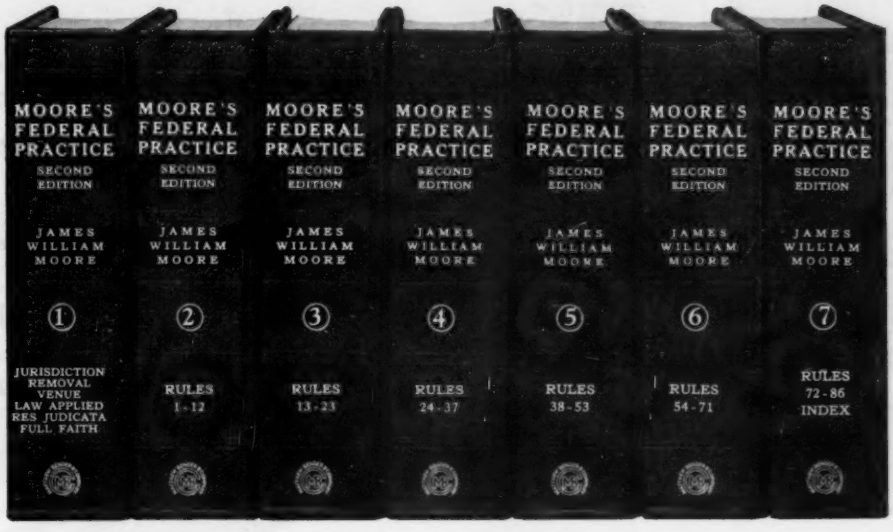
MOORE'S FEDERAL PRACTICE

Second Edition

by James Wm. Moore

Professor of Law, Yale University Research Assistant to the Advisory Committee on Rules for Civil Procedure. Editor-in-Chief of Collier on Bankruptcy, 14th Edition.



(**Note:** A dovetailing volume, not pictured, is now on press: FEDERAL CRIMINAL PRACTICE UNDER THE NEW RULES, by William M. Whitman. Prof. Moore cross refers to it and depends on it for coverage of the Criminal Rules, rather than duplicating the coverage in his own writing.)

This new Second Edition, the successor to the original work by Professor Moore, enjoys a subscription list comprised of the outstanding federal practitioners and members of the federal judiciary. The work is cited regularly in the district and appellate courts, and volumes of the second edition have already been cited* a number of times by the U.S. Supreme Court.

*(69 S.Ct. 944, 951, n29, 952; 70 S.Ct. 207, 215, 216, also n19 on 216; 70 S.Ct. 200, 205, n6; 70 S.Ct. 322, 324, n3; 69 S.Ct. 1221)

Prof. Moore has arranged a sabbatical leave from Yale to devote his entire time to preparing the remaining volumes of the Second Edition for expeditious release.

Volumes 2, 3 and 4 now ready

Volumes 1, 5, 6 and 7 in preparation

Volume 1 will cover the Judicial Code, Jurisdiction, Venue and other matters which need to be tied by cross-reference to Volumes 2-7.

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1950 ANNUAL MEETING

Washington, D.C., September 18-22, 1950

The Seventy-Third Annual Meeting of the American Bar Association and the Thirty-Second Annual Meeting of The Canadian Bar Association will be held jointly, in Washington, D. C., September 18 to 22, 1950. Further information with respect to the meetings will be published in forthcoming issues of the *Journal.*

Requests for reservations should be addressed to the Reservation Department, American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois, and should be accompanied by payment of $5.00 registration fee for each member of the Association for whom reservation is requested. Be sure to indicate three choices of hotels, and give us your definite date of arrival, as well as probable departure date.

Detailed announcement with respect to the making of hotel reservations for members of the Association may be found in the January issue of the *Journal,* at page 74.

The following is a list of Washington hotels where space is still available for the week of the Annual Meeting: Ambassador, Annapolis, Burlington, Congressional, Hamilton, New Colonial, Raleigh, Roger Smith, Twenty-Four Hundred, Wardman Park, Washington and Willard. ALL SPACE AT OTHER HOTELS LISTED IN JANUARY, 1950, *JOURNAL* NOW EXHAUSTED.

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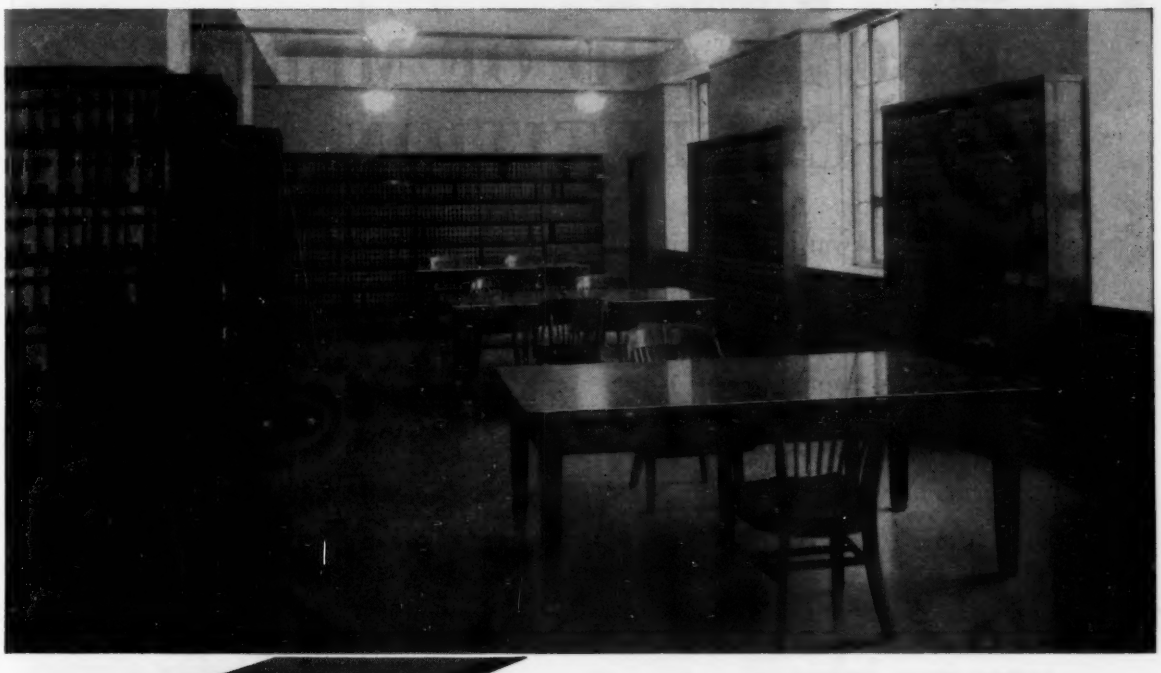

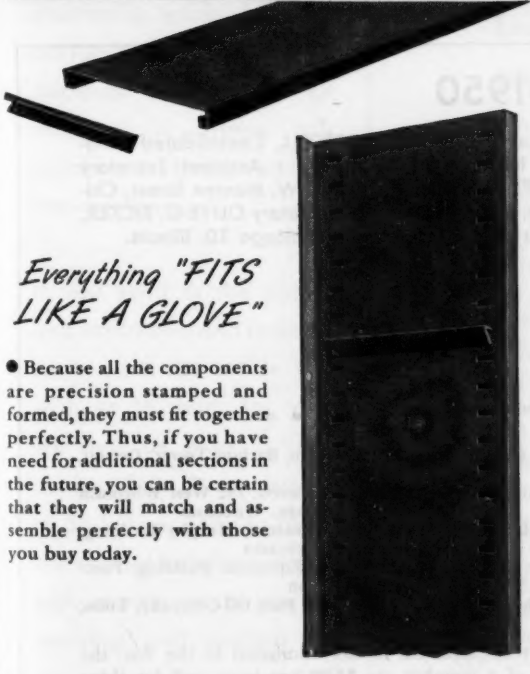

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1950 AWARD OF MERIT COMPETITION

The 1950 Awards of Merit will be made to the State and Local Bar Associations reporting the most outstanding activities, other than administrative or routine, initiated or reaching full development since September 1, 1949.

August 15, 1950, is the *final date* for filing entries. Application forms may be secured at the Headquarters office of the American Bar Association, 1140 N. Dearborn Street, Chicago 10, Illinois.

American Bar Association 1949-1950

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Persons eligible for membership in the Association may become such on being proposed in writing by a member, approved by the Committee on Admissions for his State, and elected by the Board of Governors (Constitution, Article II, Section I; By-laws, Article I, Section 1). Dues are $12.00 a year, except for the first two years after his or her admission to the Bar, the dues of a member are $3.00 per year, and for three years thereafter $6.00 per year. Blank forms of proposal for membership may be obtained from the Association offices at 1140 North Dearborn Street, Chicago 10, Illinois.

Marked Copy Service Now Available

Members who wish to bring particular articles in the *Journal* to the attention of non-members can now arrange to have marked copies of the *Journal* sent from Chicago.

We are glad to make this service available, because the effectiveness of the *Journal's* work for the profession and the public depends considerably on many of its articles, editorials, etc., being read by non-members.

If you send in the names and addresses and indicate as to each the article you wish us to mark for you, we shall be glad to send copies of the current issues, at $1.00 per copy to cover the special handling. If you wish copies sent to you for marking and mailing by you, they will be supplied at 50 cents per copy.

Liberty and Law:

The Rôle of Law in a Free Society

by **John J. Parker** • Chief Judge of the United States Court of Appeals for the Fourth Circuit

■ This article is taken from a Harlan F. Stone Lecture at Amherst College this spring. Noting that Chief Justice Stone's life was devoted to the preservation of liberty under law, Judge Parker took the occasion to restate his belief that individual freedom depends upon law for its maintenance. Communism and socialism, with their denials of individual rights and liberties have made it increasingly important, Judge Parker declares, to understand the foundations of freedom. His own concept of freedom under the law is set forth on the following pages.

■ What is a free society? We mean more by the term, of course, than that it is a society not dominated by a foreign power. We mean, I think, a society ruled by law and not by arbitrary will, one in which sovereign or supreme power rests with the people themselves and in which the rights and freedom of the individual are properly safeguarded. The freedom of the individual, however, is itself a troublesome concept. By freedom we do not mean mere absence of restraint, for by that test there could be no such thing as freedom. What we mean is that the individual is to be free to live and to develop as he will, subject to no restraint except such as is reasonably necessary for the safety, morals, health or general welfare of the society of which he is a part. The cause of much confusion in thinking about government is that the individual is more than an individual. He is at the same time a member of the social organism. As Aristotle put it, "man is a political animal". The fallacy of some philosophers is that they ignore the social element in human life, a fallacy that gives us the *laissez-faire* philosophy, the policeman theory of government. The fallacy of others is that they ignore the individual element, a fallacy that gives us the philosophy of the totalitarian state, the most threatening form of which at the present time is communism or socialism, the theory that the State is everything and the individual nothing.

The truth, of course, is that man cannot exist without the State and the State cannot exist without man. The State is organized social life. Through the State, man enjoys a richer life and reaches a higher level of existence than would otherwise be possible for him. On the other hand it must never be forgotten that what is organized in the State is but the life of individuals; that effort must come from the individual; that thought must come from the individual; and that from the individual must come also those ideals and aspirations that carry forward the life of the State itself. While it is important that proper use be made of organization to achieve those purposes that are essentially social, zeal for organization must not be permitted to crush that freedom of the individual that is necessary to the vitality of the social organism as well as of the individual himself. If a thing concerns me primarily, and no one else, I am the one to attend to it. If it concerns my family or my church, the family or the church is the one to attend to it. Only where it directly concerns the safety or welfare of the community as a whole should there be resort to governmental action. The matter was well put by José Ortega y Gasset:[1]

> This is the gravest danger that today threatens civilization: State intervention; the absorption of all spontaneous social effort by the State, that is to say, of spontaneous historical action, which in the long run sustains, nourishes, and impels human destinies. When the mass suffers any ill-fortune or simply feels some strong appetite, its great temptation is that permanent, sure possibility of obtaining everything—without effort, struggle, doubt, or risk—merely by touching a button and setting the mighty machine in motion. . . .
>
> The result of this tendency will be fatal. Spontaneous social action will be broken up over and over again by State intervention; no new seed will be able to fructify. Society will have to live *for* the state, man *for* the governmental machine. And as, after all,

1. *The Revolt of the Masses* 132-133.

it is only a machine whose existence and maintenance depend on the vital supports around it, the State after sucking out the very marrow of society, will be left bloodless, a skeleton, dead with that rusty death of machinery, more gruesome than the death of a living organism.

Such was the lamentable fate of ancient civilization. No doubt the imperial State created by the Julii and the Claudii was an admirable machine, incomparably superior as a mere structure to the old republican State of the patrician families. But, by a curious coincidence, hardly had it reached full development when the social body began to decay.

What are the rights of the individual that must be protected from the power of the State? Am I not correct in assuming that they are those that are referred to in our Declaration of Independence as inalienable rights for the preservation of which "governments are instituted among men"? These, of course, I need not enumerate—freedom of thought, freedom of speech, freedom of conscience—the right of men to be secure in their persons and in their homes from unreasonable exercise of the powers of government—the right to public trial and to be confronted by one's accusers—the right to have any imprisonment promptly inquired into by judicial authority—the right not to be deprived of life or liberty or property but by "the law of the land", the general law, which, in the language of Mr. Webster, "hears before it condemns, proceeds upon inquiry and renders judgment only after trial". These are not theoretical rights but rights of a most practical sort which men of our race, with a genius for freedom, have worked out through centuries of struggle. By the time of our Revolution they had come to be regarded as the rights of the Englishman that he might assert even against the King. We have guaranteed them in our fundamental law, not merely against the power of the executive but against the entire power of the State, so that no governmental officer, no legislative assembly, no court of justice, not even the whole people themselves can deny them to the humblest individual.

"Liberty" says the Supreme Court in an understanding and eloquent passage that we should do well to ponder in this time of confused thinking "denotes not merely freedom from bodily restraints, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[2] These are the "blessings of liberty" that our Government was established "to secure for ourselves and our posterity". This we must never forget: that the State exists for man, not man for the State; and that the glory of America consists not in her wealth or power but in that she stands and has always stood for the worth, the dignity and the freedom of the individual.

Law Is Life Principle of Society

What is law? Most persons think of law, I am afraid, in terms merely of criminal statutes or traffic regulations. Such a view of course is entirely inadequate, but it is no more absurd than that of those legal philosophers that see in law nothing but the power that enforces it. Society, whether a free society or not, is not a mere aggregation of individuals. It is an organism. The law is the life principle of that organism. It is not something imposed from without but something that arises from within. There is something in the nature of matter that causes it to act in certain ways and these ways of action we call the laws of physics. There is something, too, in the nature of human beings and of the society that they compose that determines how society should act and how the members of society should act towards each other. This is law in its true sense. It must be interpreted in terms of rules and these rules must be enforced by the power of the State; but it must never be forgotten that the source of law is not the power that enforces the rules but the life that gives rise to the power, and that the source of the rules is not the power but reason applied to the life from which the power arises.

This is not something that I have just now discovered. It is something that all the great lawyers of history have been saying to us through the ages. "Law" says Cicero "arises out of the nature of things." He thus defines it:[3]

> There is in fact a true law—namely, right reason—which is in accordance with nature, applies to all men, and is unchangeable and eternal. By its commands, this law summons men to the performance of their duties; by its prohibitions it restrains them from doing wrong. Its commands and prohibitions always influence good men, but are without effect upon the bad. To invalidate this law by human legislation is never morally right, nor is it permissible ever to restrict its operation, and to annul it wholly is impossible. Neither the senate nor the people can absolve us from our obligation to obey this law, and it requires no Sextus Aelius to expound and interpret it.

St. Thomas Aquinas and John Locke taught that the justification for human regulation and the coercion by which it is made effective lie in the nature of human beings, and that power merely gives force to that which is reasonable and right.[4] Grotius taught that certain broad principles of justice are natural—that is universal and unchangeable—and that upon these principles are created the varying systems of municipal law. He gave this definition of natural law:[5]

> The law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God.

The conflict between the natural

2. *Meyer v. Nebraska*, 262 U. S. 390, 399.
3. Cicero, Republic III, 22; translated by Sabine and Smith. Quoted in Sabine, *A History of Political Theory* 164.
4. Sabine, *A History of Political Theory* 255.
5. Quoted by Sabine in *A History of Political Theory* 424.

law theorist and the positivist or so-called legal realist has become increasingly sharp in recent years. Both in my humble judgment are partly right and partly wrong, and a correct view can be had only when their views are synthesized. The fallacy of the one is that he confounds law with ethics; the fallacy of the other that he confounds law with force. As Pascal pointed out with respect to government, both reason and force are essential in any proper concept of law. Law without the power of the State to enforce it is not law but morals. Law without the basis of morality and reason is not law but tyranny. If a choice must be made, however, it is clear that natural law has the better of the argument; for right will inevitably make might, but might cannot make right. The real lawyer should never forget that "law arises out of the nature of things", that her true voice is the voice of reason, not that of any earthly magistrate, and that her true force is the force of inherent necessity, not that of artificial machinery.

There were errors in the old theory of natural law, but the basis of the concept, which is essentially the same as our concept of the "common law", is fundamentally sound. It is not possible, of course, to deduce a system of law from abstract reasoning about human rights. On the other hand one is not realistic who does not see the organic nature of society and the necessary relationships existing among its members. And to ignore the fact that these necessary relationships form the basis of the law by which society lives and that the rules of law are deduced by applying reason to these relationships, is to close one's eyes to the most obvious fact with which the lawyer must deal. Faith in the reality of this natural law, faith in man's ability to understand and interpret it, and faith in his ability to perfect the rules of law enforced by the State through study of the ideal system that natural law envisages, is the supreme need of the world today if we are to be ruled by law and not by arbitrary will.

Law Is Essential To Preserve Liberty

From what has been said, it must be evident, not only that law is essential to order in a community, but also that a proper expression and enforcement of the natural law inherent in the nature of a free society is essential to the preservation of individual liberty. Only through law can the rights of the individual be protected from the crushing power of the State and only through law is it possible for the people themselves to exercise sovereign power. This is the basis of the Constitution of the United States, which has become the outstanding model for free governments everywhere. The Constitution is not a mere collection of pious platitudes nor is it a mere guide for governmental action addressed only to the consciences of public officers. It is law, fundamental law, addressed to the exercise of sovereign power by the people and the officers that represent them. It embodies three basic concepts. The first of these is that the individual has certain fundamental liberties or inalienable rights upon which not even the power of the State may encroach. The second is that the people concerned shall exercise sovereign power in those matters that concern them—that the people of the several states shall exercise sovereign power in local matters and the people of the nation in matters affecting the country at large. The third is that no single man or agency shall exercise the complete sovereign power, but that it shall be divided among the executive, legislative and judicial branches of the Government, to the end, as says the constitution of Massachusetts, that the Government may be one of laws and not of men.

How the Constitution functions as the fundamental law of the land is well illustrated by the case of *Ex parte Milligan*.[6] In the dark days of the Civil War, Congress passed a statute authorizing those charged with certain crimes against the safety of the Government to be tried by military commissions instead of by the courts. Milligan was tried under this statute and sentenced to be hanged. The Supreme Court, however, ordered his release because under the Constitution he had the right to trial by jury and this had been denied him by the Act of Congress. Mr. Justice Davis, speaking for the Court, eloquently observed: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."

Many lectures could be delivered upon how the freedom of the individual is protected under the Constitution, but I shall not go into this further as I wish to devote my attention to what I conceive to be the three outstanding problems in preserving liberty under law in the years that lie immediately ahead of us. These are (1) how to regulate by law the economic life of the country

John J. Parker has been a judge of the Court of Appeals for the Fourth Circuit since 1925. A native of North Carolina, his distinguished career at the bar and on the bench has won him recognition as one of the ablest of our federal judges. Now the chief judge of his circuit, Judge Parker has been a member of the American Bar Association since 1914. He was awarded the Association's Gold Medal in 1943.

6. 4 Wall. 2.

'estall the danger of collec-
which we are threatened,
. .3 use the processes of the law for the preservation of economic freedom; (2) how to preserve amid expanding governmental powers those fundamental liberties that are essential to the individual's happiness and progress; and (3) how to use our leadership in the world community to establish a world order based on law and thus assure to mankind at large the blessings of liberty that have meant so much to our own people.

Government's Duty To Preserve Economic Freedom

Laissez faire, the classical philosophy of the eighteenth century, has never been that upon which our Government has proceeded. It was repudiated when the First Bank of the United States was organized, and the contrary doctrine was so well expressed in Hamilton's report on manufactures that as a practical matter we have never got away from his statement.[7] Even Mr. Jefferson, who is regarded as an adherent of the *laissez-faire* school, so far abandoned its tenets when faced with the responsibilities of the presidency that it is almost impossible to draw a line between his theories and those of Hamilton as to the proper functions of government.[8] As we have gone along, our Government has established a great postal system, regulated banking and currency, protected manufacturing through tariff duties, helped finance the great railroad systems, fostered agriculture in a hundred different ways, subsidized a merchant marine, constructed the Panama Canal, regulated the charges of public service corporations, undertaken control of floods in the rivers, spent hundreds of millions of dollars for relief of unemployment and done countless other things demanded by the social welfare for the doing of which we could not depend upon individual effort. We have accepted the practical view that it is the proper function of government not merely to preserve peace and order but also to regulate economic life and to undertake any activity in behalf of society that the social welfare demands and that the individual either should not undertake because of the social interests involved or would not undertake because of the magnitude of the undertaking or for other reason. As President Lincoln expressed it: "The legitimate object of government is to do for a community of people whatever they need to have done, but cannot do at all, or cannot do so well, for themselves, in their separate and individual capacities."

Economic Power Is Threat to Individual Freedom

In the early days of the Government, the chief danger to individual liberty lay in the direction of political power. With the coming of the machine age, however, and the economic and sociological revolution that resulted, the most dangerous threat to the liberty of the individual lay in the direction of economic power, and only through the use of political power could the individual cope with it. Vast aggregations of capital threatened a monopolization of industry with swollen fortunes for the few and economic serfdom for the many. The tools with which labor works passed into the hands of capital and laboring men lost the economic independence and security which were theirs in former days. Agriculture became dependent as never before upon commercial forces and farmers were obliged to sell their products in markets where prices were influenced by international agreements and trading on a national scale. Under such circumstances it is idle to suppose that the power of the Government would not be used for the regulation of economic life. Monopolies must be curbed. Unemployment must be relieved. Justice must be secured in the relations of capital and labor. A living wage for labor and a living price for farm products must be guaranteed. And conditions must be fostered that will provide for the healthy growth of industry and the just division of its rewards. *Laissez faire* is gone if it was ever here. Free men will no more submit to economic tyranny than to political tyranny. The Government is their creation and it is the only agency that they have with sufficient power to deal with the economic forces that threaten them. The contest is not between *laissez faire* and governmental regulation, but between regulation and some form of collectivism; for it is as certain as anything can be that unless the people are protected from the abuses of economic power they will turn to state ownership and operation of productive enterprise, as the recent history of Europe abundantly proves.

The difference between governmental regulation of economic life and state socialism is basic and fundamental. One preserves free enterprise; the other destroys it. Without government regulation, the liberty of the individual is crushed by uncontrolled economic forces; under socialism, it is crushed by political power functioning in the economic field. State ownership and operation of productive enterprise, which is the essence of socialism, means not only the inefficient control of industry by political power but also the basic denial of the right of private property and the right to work where one will, with the deadening effect which this has upon individual energy and initiative. State regulation guards against economic despotism without setting up an equally dangerous and detestable political despotism.

The development of legal processes for the regulation of economic life is a task of the utmost importance. It has involved, among other things, the growth of the administrative agency, combining within itself certain legislative, executive and judicial powers to the horror of ultraconservative lawyers. Their excitement, however, leaves me ab-

(Continued on page 591)

7. 3 Works 250. *Cf. U. S. v. Butler*, 297 U. S. 1; *Charles C. Stewart Mach. Co. v. Davis*, 301 U. S. 548, 586, 587.

8. See Dorfman, "The Economic Philosophy of Thomas Jefferson", 55 *Political Science Quarterly* 98.

The Administrative Law of Michigan:

Winning Essay in Administrative Law Contest

by **Frank E. Cooper** • of the Michigan Bar (Detroit)

■ This is the essay that won the first prize of $1500 in the State Administrative Law Essay Contest conducted in 1949 by the Section of Administrative Law of the American Bar Association. The contestants were required to write about the administrative law of their own states, but were free to review the administrative law of the state generally or to confine themselves to one aspect of the subject.

■ Michigan's endeavors to secure just, wise and informed administrative action have been premised principally on the policy of retaining in the legislature and the judiciary broad powers of superintending control over administrative determinations. Emphasis has been placed primarily on legislative supervision and judicial review, rather than on improving the procedures and practices within the agencies.[1] The state has not been inclined to give broad effect to the principles of administrative finality. An attitude of conservatism, shared by both legislature and court, is characteristic of Michigan's law of administrative agencies.

In any jurisdiction, constitutional doctrines as to delegation of legislative and judicial powers circumscribe the field of action for administrative agencies, and thus limit the area within which arise the problems concerning administrative procedure and judicial review. A logical starting point for any appraisal of the administrative law of a state, therefore, is an examination of the decisions of the state's supreme court bearing on this question of delegation of power.

In Michigan, as in other states, early decisions insisted that strict standards must be set to guide administrative determinations;[2] but as early as 1915, the pendulum began to swing in the opposite direction,[3] and, by the mid-twenties, the court was ready to sustain comparatively broad delegations of power.[4] During the last twenty-five years, the court has quite uniformly upheld, as against the argument that legislative or judicial powers were being improperly delegated, statutes granting administrative agencies authority to make initial determinations in almost all fields of governmental activity. The court has sustained, for example, delegation of power to appoint bank receivers,[5] and to administer parole systems.[6] In 1940 (quite abandoning the euphemistic fiction that only "quasi" legislative powers may be delegated), the court declared that "within proper limits, legislative power may be delegated";[7] and recently the court has observed that delegation of discretionary powers is unobjectionable "where reasonably essential" in the administration of a statute.[8]

While thus permitting a broad delegation of power to make the initial decision, the Michigan court has nevertheless (in contrast to the federal courts)[9] insisted on retaining a rather close superintending control over delegated administrative discre-

1. In some other states and in the Federal Administrative Procedure Act, as well as the Model State Administrative Procedure Act drafted by the National Conference of Commissioners on Uniform State Laws, efforts toward improved administrative performance have been based on the policy of relying mainly on codes of administrative procedure designed to assure that determinations will be made by able, impartial officers and solely on the basis of information obtained at hearings conducted fairly and with due regard for private interests.

2. *King* v. *Concordia Fire Insurance Company*, 140 Mich. 258 (1905).

3. *Mackin* v. *Detroit-Timken Axle Co.*, 187 Mich. 8 (1915); *Traverse City* v. *Michigan R.R. Comm.*, 202 Mich. 575 (1918).

4. In sustaining a grant of power to a corporation and securities commission to revoke a securities dealer's license for "good cause", the court found that the standard prescribed was sufficiently definite, because the statute "designates with as much particularity as is consistent with public policy and the rights of all concerned, the power vested in the commission"; and declared that "the power to carry out a legislative policy may be delegated to an administrative board under quite general language", so long as the legislative policy is made clearly apparent. *Redmond & Co.* v. *Securities Commission*, 222 Mich. 1, 4 (1923).

5. *Emery* v. *Shinn*, 278 Mich. 246 (1936).

6. *In Re Casella*, 313 Mich. 393 (1946).

7. *Milk Marketing Board* v. *Johnson*, 295 Mich. 644, 651 (1940).

8. *People* v. *Chapman*, 301 Mich. 584, 600 (1942); and see *Salway* v. *Secretary of State*, 321 Mich. 211 (1948).

9. *Cf.*, *Yakus* v. *United States*, 321 U.S. 414 (1944); *American Power Co.* v. *SEC*, 329 U.S. 90 (1946).

tion. It has declared that the statute must so limit discretion as to enable the courts to "test and try" the validity of the administrative order by "ordinary processes of judicial inquiry".[10] Where delegations of power to administrative agencies have been so broad as to preclude effective judicial review, the statutory provisions have been held invalid.[11]

By thus insisting on retention of broad supervisory control, the Michigan court limits the actual effective scope of administrative discretion under statutes which appear to contain broad delegations of power.

Procedure Followed in Contested Cases

In determining when notice and hearing must precede administrative action in the determination of contested cases (a determination which profoundly influences the whole course of administrative procedure) both the Michigan court and the state's legislature have exhibited considerable concern for protecting private interests from the possibility of arbitrary administrative action. Notice and hearing is required in cases where some other states dispense with it.[12]

Statutory requirements roughly parallel, and in some instances go further than, the provisions of the Model State Administrative Procedure Act in respect to the right of all interested parties to receive notice and hearing before the administrative determination is made.[13]

The court has consistently required that definite, particular notice to the interested parties must precede administrative action. It has strictly construed statutory provisions in holding that the notice must specify not only the date of the hearing, but also the hour;[14] it has required that the notice give a fair statement of the issues involved;[15] that the notice set forth facts, rather than mere conclusions;[16] that if new issues develop at the hearing, the complaint must be formally amended, and the respondent given an opportunity to meet the new claims.[17]

Agencies Must Follow Judicial Pleading Requirements

By its insistence that the initiatory papers give reasonable notice to respondent, the Michigan court has forbidden agencies to ignore completely the rudimentary requirements of judicial pleading.[18] However, the court has recognized that it cannot, without the aid of statutory regulation, go far in requiring agencies to follow the modes of pleading which the court deems desirable.[19] In the absence of such legislative requirements, many agencies have fallen into the practice of using highly formalized methods of pleading which give respondent little information as to the real nature of the agency's claims. There is considerable discrepancy between different agencies in respect to the extent that pleadings serve their intended purpose; but instances of poor pleading are in actual practice not uncommon. Members of the Bar have frequently pointed out the need for improvement in this respect.

Agencies Have Little Trouble in Securing Information

Because of the limited investigatory powers granted administrative agencies in Michigan, and for the further reason that the evidence produced at the hearing is ordinarily offered by interested private parties, the problem of investigatory powers which looms so large in the case of the federal agencies[20] creates few difficulties in this state.

Most of the state agencies have but little occasion to compel the disclosure of information from private parties wishing to conceal it. In cases where an agency institutes proceedings against a private party, the agency's evidence is ordinarily limited to testimony of complaining witnesses and to records obtained from the defendant by subpoena.[21] Moreover, the great bulk of administrative activity involves situations where the information is produced for the benefit of the agency by adversely interested private parties. Hence, there is little occasion for parties to complain of broad investigatory powers of the agencies.

However, practical difficulties are encountered in cases where a party respondent requires the aid of compulsory process to compel the production of the evidence on which he desires to rely. In very few cases do the Michigan statutes carry provisions guaranteeing this right, and many agencies have exhibited considerable reluctance to issue subpoenas for the benefit of the respondent.[22] Room undoubtedly exists for

10. *Argo Oil Corporation* v. *Atwood*, 274 Mich. 47, 53 (1935).

11. *Chrysler Corporation* v. *Unemployment Compensation Commission*, 301 Mich. 351 (1942); *Dation* v. *Ford Motor Co.*, 314 Mich. 152 (1946); *Detroit* v. *Commercial College*, 322 Mich. 142, 148 (1948).

12. The attitude of the Michigan Court is illustrated by its requirements that in giving notice of tax sales, the administrative officers must precisely describe each parcel to be sold—*In Re Auditor General*, 275 Mich. 462 (1936); that in eminent domain proceedings, there must be an opportunity for hearing on the question of the necessity for the taking as well as on the question of compensation—*Hendershott* v. *Rogers*, 237 Mich. 338 (1927).

13. In a number of cases, the statutes specify that the notice must precede the hearing by a specified time—often 10 to 20 days (Public Utilities—M.S.A., §§ 22.41, 22.537, 22.579; Corporation and Securities Commission—M.S.A. §§ 19.754, 19.804; Dairy Products Licensing Act—M.S.A. § 12.613), but occasionally thirty or even sixty days, in cases where it is deemed there is no pressing public interest in immediate action (Banking Commissioner—M.S.A. § 23.731; Insurance Commissioner—M.S.A. § 24.5(1). Even in the case of proceedings by local boards of health to suppress nuisances—where many states permit summary action—twenty-four hour notice is required (M.S.A. § 14.69). In other cases, statutory provision is cast in more general language, requiring "due notice and proper hearing", or specifying that there must be "reasonable opportunity given for the submission of relevant information", and the like.

14. *Baura* v. *Thomasma*, 321 Mich. 139 (1948).

15. *In re Van Hyning*, 257 Mich. 146 (1932).

16. *Board of Registration* v. *Wicker*, 280 Mich. 600 (1937); *People* v. *Artinian*, 320 Mich. 441 (1948).

17. *Deadwyler* v. *Consolidated Paper Co.*, 260 Mich. 130 (1932).

18. See cases cited in notes 14-17, and see *People* v. *Artinian*, 320 Mich. 441 (1948).

19. *People ex. rel. Elliott* v. *O'Hara*, 246 Mich. 312 (1929); *Prujansky* v. *Liquor Control Commission*, 315 Mich. 193; (1946).

20. For a full discussion, see Davis, "The Administrative Power of Investigation", 56 *Yale L. Jour.*, 1111 (1947).

21. The normal practice has been to limit such administrative subpoenas to specifically described documents of unquestioned relevancy, and there has been little if any occasion for the Michigan courts to pass on claims that agency subpoenas are so broad as to constitute unwarranted fishing expeditions.

22. Neither the court nor the legislature has paid much attention to this problem. In 1947, a bill was introduced, but was not enacted, to require that the agency must state in writing its reasons for the refusal of an application by a private party for the issuance of an agency subpoena.

enactment of statutory provisions akin to those of the Federal Administrative Procedure Act aimed at guaranteeing that the processes of subpoena will be as readily available to parties respondent as to agency staffs.

Fairness of Hearing Procedure Safeguarded by Court

The legislature has exercised but little control over the hearing procedures to be employed by state agencies, leaving largely to the court the problem of safeguarding the fairness of the hearing procedures employed. The court, it is fair to say, has been vigilant in fulfilling its responsibilities. Suggesting that the statutory limitations on judicial review emphasize the judicial duty to safeguard the fairness of administrative hearing procedures,[23] the Michigan court has gone far in voiding administrative procedures wherever a substantial possibility of unfairness exists. Illustrative of the court's attitude is its holding requiring disinterestedness in a state administrative board regulating a competitive industry.[24] Emphasizing the necessity of eliminating all appearance of possible unfairness, the court has voided administrative orders on the ground that the hearing was before an officer who was "subject to a suspicion of prejudice", even though it was conceded that no actual prejudice was shown.[25] Similarly, the court has ruled that an agency employee who has taken part in procuring evidence to support the agency's case may not participate in making the decision.[26]

Influenced, doubtless, by this attitude of the court, Michigan agencies have tended to adopt hearing procedures which are characterized by a higher degree of formality than those of many other jurisdictions. Testimony is taken under oath in practically every case (although statutory requirements to this effect are rare); and it is the accepted practice to record the testimony stenographically.[27] The rights of cross examination and of presenting evidence to meet or rebut the agency's case are uniformly recognized, and not infrequently guaranteed by statute.[28]

The Michigan court has thus been successful in its insistence that hearing procedures meet at least the minimum requirements designed to assure fairness. But there remains ample room for further improvement, which could be achieved most readily by statutory enactment, respecting such matters as (a) qualifications of hearing officers; (b) eligibility of lay agents to represent clients; (c) separation of prosecuting and adjudicatory functions.

Agencies Tend To Follow Rules of Evidence

It would be expected that in a state where typical administrative hearing procedures are characterized by a considerable degree of formality, the general practice of the agencies would be to follow, more or less, the rules of evidence which prevail in nonjury cases tried in the state courts. Such, in fact, is the result in Michigan. There is a marked tendency to depend on the rules of evidence as developed in the courts. A recent canvass of representative members of several state agencies revealed that the majority of them shared the opinion that legal rules of evidence should generally be followed in administrative proceedings.

One factor contributing largely to this result is the uniform adherence by the Michigan court to the so-called "legal residuum" rule, the doctrine that administrative findings of fact can be set aside unless they are supported by at least a residuum of legally competent evidence.[29] While the rule has been ridiculed by many able scholars and is perhaps logically unsound, it has served at least one desirable purpose. In their endeavor to make sure that there is some legally competent evidence to support every finding, hearing officers tend to emphasize the importance and desirability of building the record on legally competent evidence.[30]

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23. *Milk Marketing Board* v. *Johnson*, 295 Mich. 644, 655 (1940).

24. See comment in 89 *U. of Penn. L. Rev.* 977 (1941), discussing the *Johnson* case, *supra*, note 23. In the cited case, the court held invalid a statute creating a milk marketing board because of a statutory requirement that a majority of the board be selected from individuals engaged in the milk marketing business. This, the court said, meant that the majority would have a direct pecuniary interest in the matters submitted to them; and the act was, therefore, fatally defective, even though there was no claim that any member of the board acted unfairly or arbitrarily.

25. *Talbert* v. *Muskegon Construction Co.*, 305 Mich. 345 (1943). But mere intemperate remarks by a hearing officer do not constitute a basis for voiding the administrative determination, if no consequent injury appears; *Shinavier* v. *Liquor Control Commission*, 315 Mich. 188 (1946).

26. *Deadwyler* v. *Consolidated Paper Co.*, 260 Mich. 130 (1932).

27. This, too, is done in cases where statutes do not specifically so require; although in several cases, there are statutory requirements to this effect —e.g., Public Service Commission (M.S.A. § 22.8), Workmen's Compensation Commission (M.S.A. § 17.184), Unemployment Compensation Commission (M.S.A. § 17.538).

28. Public Service Commission (M.S.A. § 22.41), Corporation & Securities Commission (MSA § 19.758), Liquor Control Commission (M.S.A. § 18.991), Insurance Commission, M.S.A. § 24.5(1)).

29. Established as early as *Reck* v. *Whittlesberger*, 181 Mich. 463 (1914), this rule has been consistently followed by the Michigan Court. *E.g.*, *Swedberg* v. *Standard Oil Co.*, 271 Mich. 184 (1933).

30. The State Bar favors the principle that hearing procedures should be subject to the legal rules of evidence. The recent recommendations of its committee on administrative agencies for the adoption of a State Administrative Procedure Act, include a recommendation (differing from the provisions of § 9(1) of the Model Act) that agencies

The state legislature has indicated its approval of the general policy of following closely the legal rules of evidence in administrative proceedings. In several instances, specific statutory requirements exist.[31]

Morgan Case Rule Receives Scant Attention

The rule of the *Morgan* case[32]—that the one who decides must hear the evidence—has received scant attention in Michigan. While the Michigan court has indicated[33] that it recognizes this requirement, it has had but little occasion to apply the rule. Probably this situation is accounted for by the fact that as a matter of actual practice, the officers making the decision do so on the basis of an adequate knowledge of all the factual circumstances involved.[34] Thus, by and large, the purpose of the *Morgan* rule is satisfied. There are instances wherein violations of the rule appear to exist, but such departures have not been challenged as producing unfair results.[35]

Neither the legislature nor the court has insisted that administrative determinations be accompanied by specific findings of fact. The comparatively few statutory provisions are rather loose and vague,[36] and it is seldom possible to show a violation of such statutory requirements as do exist.[37] Agency heads informally acknowledge that their practices as to preparing formal findings of fact leave something to be desired, and explain the situation by pointing to the heavy case-loads carried.[38] Considerable gain would be achieved by the adoption of a statute, along the lines indicated by the provisions of the Model State Act, requiring the filing of specific findings.

Legislature Is Chary of Delegating Rule-Making Powers

The attitude of conservative restraint which characterizes Michigan's general view of administrative agencies, has led the legislature to be somewhat chary of delegating substantial rule-making powers to state agencies. Agency rule-making activities are principally in the field of procedure; few agencies have power to adopt rules of general application affecting substantive rights. In view of the restricted sphere of administrative rule-making activities, the legislature has seen but little need to make detailed provisions respecting the rule-making procedures to be followed by the agencies.

The result of this legislative neglect has been that the actual practices of Michigan agencies, in connection with the adoption of rules, merit little praise. There appear to be no statutory provisions concerning the filing of petitions for the adoption of rules—and as a result, agencies often ignore such petitions. Nor are agencies required to publish descriptive statements of their procedures and it is accordingly difficult to learn, except by personal inquiry, what the actual procedures are. Only one case has been found wherein the statutes require advance notice to interested parties of the proposed adoption of rules,[39] and generally there is no public participation in the formulation of rules. This would be desirable, both as a means of assuring wise administrative action and as a means of assuring those affected by the rules that their particular problems and suggestions had received the attention of the rule-making authorities.

Rules Must Be Published and Approved by Attorney General

The Michigan statutes require (in accordance with the legislature's customary attitude of exercising a comparatively close degree of supervision over administrative activities) that after an administrative rule has been adopted, it must be subjected to a thorough-going official scrutiny. Under the requirements of a recently adopted act,[40] every administrative rule must be submitted to the state Attorney General, approved by him as to form and legality, and thereafter filed with the Secretary of State. Except in cases of emergency and upon the certification of the Governor, no rule can become effective until after it has been printed and distributed by the Secretary of State. In these respects the requirements are somewhat more stringent than those of the Model State Act.

How To Test Validity of Rules Is Not Clear

Michigan does not have any well-established procedure for obtaining a declaratory determination through judicial procedures, of the validity of administrative rules. Whether de-

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shall so far as practicable, follow the rules of evidence prevailing in chancery cases; 27 Mich. *State Bar Jour.* 12 (September, 1948).

31. Thus, statutes provide that in proceedings before the State Department of Revenue, the legal rules of evidence shall be controlling (M.S.A. § 7.657-7); and that in license revocation proceedings conducted by the Liquor Control Commission, no hearsay evidence may be received (M.S.A. § 18.975-1).

32. *Morgan* v. *United States*, 298 U. S. 468 (1936).

33. In *Hanson* v. *State Board of Registration*, 253 Mich. 601, 607 (1931), the court declared that the respondent is entitled to a "fair determination according to the evidence . . . by the body before whom the hearing is had".

34. In a number of instances, the agency heads themselves hear the testimony. This is the case, for example, in proceedings before the Public Service Commission. In other cases, there is statutory authority for delegation of decision-making power, with the result that the decision is made by an officer who possesses full familiarity with all the facts of the case.

35. In workmen's compensation proceedings, the statute (M.S.A. § 17.182) provides that the decision of the deputy commissioner who hears the evidence shall be final, in the absence of an appeal to the full commission. In such case, the statute requires (M.S.A. § 17.185) that the Commission shall "promptly review the decision, together with such records as may have been kept of the hearing". In actual practice, there exists an apparent departure from the strict letter of the statute, a member of the Commission advising that "at least one member of the Commission reads the entire record in every contested case which is appealed; in some of these cases more than one member reads the record". In proceedings before the Liquor Control Commission, hearings on license revocation proceedings are held before an examiner, who is required by statute to report his findings to the Commission "for decision"(M. S.A. § 18.975-1). It has been held that the actual decision must be made by the Commission. *Case* v. *Liquor Control Commission*, 314 Mich. 632 (1946). In practice, the Commission "makes its initial decision on the findings, and the record, if it feels it necessary to have the record transcribed". (Letter from Commission member). It is, of course, difficult to reconcile these practices with the requirements of the *Morgan* decision.

36. *E.g.*, M.S.A. § 24.5(1), requiring findings by the Insurance Commissioner in certain types of cases; M.S.A. § 10.301, requiring the Aeronautics Commission to set forth in writing its reasons for decision, in certain cases.

37. *Beardsley* v. *Bethlehem Church*, 261 Mich. 458 (1933).

38. The Workmen's Compensation Commission last year decided more than 450 cases, for example. Comparable loads are carried by several other agencies.

39. Michigan Unemployment Compensation Act, M.S.A. § 17.504.

40. M.S.A. § 3.560(7) *et seq.*

Is World Government Feasible?

A Reply to W. T. Holliday

by Sol M. Linowitz • of the New York Bar (Rochester)

▪ This article is a reply to W. T. Holliday's "World Law or World Anarchy: The Case for World Government" which appeared in the August, 1949, issue of the *Journal* (35 *A.B.A.J.* 641). Mr. Linowitz does not disagree with Mr. Holliday on the question of the desirability of world government, but he thinks that any course that would urge an immediate adoption of a world government is doomed to failure and that such a failure might doom the entire world to international anarchy.

▪ In the August, 1949, issue of the JOURNAL appears a thoughtful and provocative article by W. T. Holliday in behalf of world federation. Mr. Holliday, the Vice President of the United World Federalists, believes that enduring world peace can be achieved only by the early establishment of a limited world government empowered to make and enforce laws binding on member states and their citizens. Lawyers, he maintains, should be at the forefront of the movement to transform the United Nations structure into such a world federation, since "no other group of people understands so well as the lawyers that peace and security can only be secured through law and order, that there can be no peace or security without justice, and that there can be no justice without government".

Few right-thinking people will quarrel with the fundamental objective toward which the proponents of world federation would have us strive—a world governed by law. People of good will throughout the world believe that the ideal solution to international problems lies in some kind of world government, meaning (1) international conduct based on law, (2) subservience of national sovereignty to that law, and (3) adequate authority to enforce such law. Many, however, differ with Mr. Holliday and the United World Federalists as to the timing, emphasis, origin and degree of such world government.

A major premise for the argument of virtually all world government advocates is their assumption that the dangers of war can be dispelled to a large extent by rewriting the United Nations Charter in order to create the type of world government they seek. Unhappily, the answer is not so simple. The enactment of a law or the revision of a charter or constitution has never been enough, in and of itself, to abolish a solemnly proscribed sin or evil. Our experience under the Eighteenth Amendment is a constant reminder that in the final analysis laws depend for their efficacy upon society's acceptance.

Legislation Will Not Eliminate War

By the same token, international harmony and the amicable and orderly settlement of disputes between nations cannot be achieved by legislation. If history teaches us anything, it is that war is as frequently waged to overthrow an established constitutional order as to enforce it should disagreement exist on basic issues. When the challenge of slavery split this great nation, our Constitution fluttered impotently as the National Government fought for its life. That war was no less bloody or devastating merely because it was called civil.

It is a truism of political science that the formation of a society must precede the establishment of a state. Putting it another way, laws and constitutions have force only where a community has adopted common rules of conduct and behavior on the basis of which law and order can effectively operate. Here lies one major difficulty with the argument for early establishment of a world federation. In a world wracked by cold war, hostility and tension—where any move toward persuading governments to forsake their special interests meets bitter opposition—where basic disagreement exists between powerful nations as to what is right and what is wrong—the world

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government dream is far removed from reality. The fundamental problem before the world is not that we have written the wrong kind of international rules, but that nations have refused to abide by the rules already written. The pressing need of the moment is not a change in the obligations of nations, but adherence by them to obligations already assumed.

The experience of the framers of our own Constitution, frequently relied upon by world federalists to support their position, indicates dramatically and forcefully how great would be the difficulties in the way of attaining effective world federation. John Jay in the *Federalist*, No. 2, remarked about the geographical unity of America and then went on to say:

> With equal pleasure I have as often taken notice, that Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts—fighting side by side throughout a long and bloody war, have nobly established general liberty and independence.

If only nine of the original thirteen colonies—thus united in origin, tradition, background and customs—saw fit to ratify the Constitution at Philadelphia, in order to achieve a "more perfect union", how long and arduous must be the task of gaining acceptance of a federation for the world!

Certainly nothing in recent international history supports the suggestion that Russia might be willing to enter into such a world federation "peacefully and cooperatively" arrived at. Yet to proceed at this critical and fateful hour to form a part-world federation without the Soviet Union and her satellites would neither retard the armaments race nor diminish in any respect the dangers of war.

Revision of Charter Will Not End Cold War

The grim fact, therefore, is that any present effort to revise the language of the Charter or the form of the United Nations structure cannot achieve either durable peace or effective world government. So long as fundamental global problems remain unsolved, there is no stable foundation for a harmonious world community which must serve as the basis for world government.

Some day the time will come when the most important question confronting the peoples of the world will be Charter reform and revision. Many questions will then have to be answered, many decisions made. What shall be the basis of representation in the World Assembly? How can we be sure that such a government shall be democratic rather than totalitarian? How great a force shall each country be permitted to retain to defend its own borders? Can the United States lawfully join such a world government without an amendment to the Constitution?

For the immediate present, however, our job is to work with the United Nations organization as it now exists—as a place where all nations may come together and strive for agreement—and seek to give it blood and bones as an effective instrument for world peace. The task requires whole-hearted support of every step designed to extend the usefulness of the United Nations and to perfect its operation. At the same time, major advancements in international law and order can be brought into being gradually as social reality and enforceable world law come closer together.

The ideal of world government must be kept alive and virile as the ultimate goal. But the major thrust must today be directed toward the more immediate and attainable growth and development of the United Nations on a functional level so that peace may be preserved until stable world government can be established.

Unless first things are put first, there is great danger that we may lose both the peace and the dream. For the bloom can never be brought to full flower if the seedling is permitted to wither.

The Fountainhead of the Law:

Ex Facto Oritur Jus

by **Eugene C. Gerhart** • of the New York Bar (Binghamton)

■ An old Georgia lawyer once said "Study the facts and the law will take care of itself". One of the greatest advocates that this country has produced, Louis D. Brandeis, made himself famous when he presented a brief to the Supreme Court consisting of two pages of legal argument and over a hundred devoted to the facts of his case. In this article, Mr. Gerhart develops the thesis that facts are the fountainhead of the law, and that the lawyer who neglects to master the facts of his client's case is ignoring his clients' welfare and his own reputation as well.

■ Chancellor Kent of New York once revealed his method of deciding cases. He said in a private letter:[1]

> I first make myself master of the facts, [then] I see where justice lay and the moral sense decided the court half the time; I then sat down to search the authorities. I might once in a while be embarrassed by a technical rule, *but I almost always found principles suited to my view of the case.*

If this *is* the method pursued by most judges then the advice of an old Georgia lawyer must be the motto of the successful lawyer—study the facts and the law will take care of itself.[2]

No one knows the devastating power of persuasion that inheres in a single fact better than the trial lawyer. In advocacy, facts have always been the foundation of persuasive argument. The convincing force of an argument depends upon the clearness with which the advocate presents the facts of his case.[3] Emerson tells us rightly that the man with the facts, though he be otherwise ignorant, will carry the day![4]

We lawyers are constantly tempted by the seductive desire to concentrate on the law problem rather than on the fact problem because it is a lawyer's business to know law. Yet experience at the Bar proves that the lawyer's first duty is to ascertain the facts. A lawsuit is more often than not a quarrel not over what the law is but over what the facts are or what they prove. Legal brilliance or high reputation at the Bar will seldom compensate for an accurate and full knowledge of the facts of the case.

The tendency of young lawyers just out of law school when they have a new case is to go to the law library, take down the digests and try to find that legal needle in a haystack, a case in point. This is generally a futile procedure because without the facts, they cannot know what point of law their case involves. An opinion, legal or otherwise, is only as good as the facts upon which it is based. Therefore, before we ever get to the case in point, our first task is to have a competent analysis of the facts upon which to base our opinion of the issues involved. Guessing, assumptions or trial-and-error methods do not count when they run up against cold, hard facts. Relevant facts, properly presented and interpreted, are the strongest witnesses. They may

1. As quoted by Mr. Justice Robert H. Jackson in an address before the Beaver County Bar Association at Beaver Falls, Pennsylvania, March 30, 1935. Justice Jackson commented in his speech that Chancellor Kent ". . . I suspect gave a pretty accurate picture of the method pursued by most judges". And see Hughes, *The Supreme Court of the United States* (1936) 61-62.

2. Powell, *I Can Go Home Again* (1943) 141.

3. Wellman, *Day In Court* (1910) 38.

4. In his *Essay on Eloquence*, Emerson says: "The orator, as we have seen, must be a substantial personality. Then, first, he must have power of statement,—must have the fact, and know how to tell it. In any knot of men conversing on any subject, the person who knows most about it will have the ear of the company, if he wishes it, and lead the conversation,—no matter what genius or distinction other men there present may have; and in any public assembly, him who has the facts, and can and will state them, people will listen to, though he is otherwise ignorant, though he is hoarse and ungraceful, though he stutters and screams.

"In a court of justice, the audience are impartial; they really wish to sift the statements, and know what the truth is. And, in the examination of witnesses, there usually leap out, quite unexpectedly, three or four stubborn words or phrases which are the pith and fate of the business, which sink into the ear of all parties, and stick there, and determine the cause. . . .

"In every company, the man with the fact is like the guide you hire to lead your party up a mountain or through a difficult country. He may not compare with any of the party in mind, or breeding, or courage, or possessions, but he is much more important to the present need than any of them. That is what we go to the courthouse for,—the statement of the fact . . ."

be silent, but if favorable, they bring success; if unfavorable, they lead to defeat.[5]

Lawyer's First Task Is To Get Facts

The lawyer's first task then is to get the facts. "Law" itself is a fact in one sense, but the popular distinction between "law" and "fact" is accurate enough for our purposes.[6] Let us examine, then, appropriate methods of gathering and analyzing facts.

No organization has more dramatically demonstrated skilled techniques in fact-gathering than the Federal Bureau of Investigation. It has made an excellent impression on the legal profession. Its work in handwriting and document examination has been outstanding, as have its firearms identification, ballistics and chemical analyses. Microscopic examination of evidence such as dust, debris, glass or a single hair, may constitute clinching evidence in a case.[7] This application of modern scientific methods to determine facts carries a lesson for practicing lawyers. Wigmore's volume, *Principles of Judicial Proof*,[8] illustrates in masterly fashion what a real analysis of evidence involves. For a lawyer to make his case appear "simple" requires the most discriminating kind of analytical work on his part. In analyzing his case, he should suspend his judgment if he has insufficient facts upon which to base an intelligent conclusion. He may need more facts![9]

One of the most common methods of learning the facts of a case is interviewing client or witness. No good lawyer will ever accept any witness' interpretation of a factual situation without checking it. This skepticism is not an attack on the witness' veracity so much as it is a recognition of human fallibility in observation, retention and recollection. Two rules can be deduced from this:

First: All investigative work must be done thoroughly;

Second: The investigation should be made as quickly as possible and recorded in a written, signed statement.[10]

A lawyer should approach this investigative problem with only one standard in mind. That standard is absolute accuracy down to the minutest detail. While this ideal is not always possible of attainment, still it is the target to be aimed at in all investigations.

Logicians tell us that the test of truth is this: it is that which enables us to organize our thought and perception. The scientific method of doing this is by:

1. Observation
2. Experiment
3. Classification, and
4. Hypothesis, which leads us to
5. Deduction.[11]

If we are to come to correct deductions as to the facts, we must be correct in our observations, in our experimenting or our testing of those observations, and in our classification of them. Then, when we formulate our hypothesis of the case and deduce the ultimate conclusion from those facts, our theory of the case should be accurate. The only real proof of a hypothesis is that it is the only one that will actually fit the facts. There is no room here for wishful thinking or expounding legal theories without regard to the facts. Jefferson said that "A patient pursuit of facts, and a cautious combination and comparison of them, is a drudgery to which man is subjected by his Maker if he wishes to obtain sure knowledge". Nowhere is this truer than in analysis of a legal factual situation.

Lawyer Must Face All the Facts

There are several points in analyzing facts that should not be overlooked. First of all, assuming a set of facts or conditions does not give them existence or proof. A single experiment may prove a hypothesis or conclusion wrong. Apparent contradictions of the theory of the case should be examined, not ignored. The lawyer must not fail to catch any taint of inherent improbability in his client's plausible recital of facts.[12] Evidence that tends to support preconceptions should be more critically examined than otherwise. It is so convenient to be "reasonable men"—we can believe so easily what we want to believe. But a lawyer, like the scientist in his analysis, must sit down before facts, as Huxley said, like a little child and learn what those facts have to teach.[13] It is up to the lawyer to face all the facts. Though he may refuse to see the facts, they are facing him—as his opponent or the judge will remind him in court. It is always difficult to understand a man who thinks without regard to the facts. Perhaps, however, there is something worse than refusing to face facts. That is seeing the facts, actually understanding them and yet being unable to act on the basis of such understanding. Such paralysis of will is inexcusable. In advocacy it is fatal. Many people have only a limited capacity to assimilate facts after they have "learned" them. Facts may exist in the mind without influencing the judgment at all.[14] The power of reason to control men's action is rather limited. A mature lawyer, however, will learn to accept facts, to weigh them and not to ignore their truth merely because they may conflict with his desires, his prejudices or his hopes. Even so practical a philosopher as Ben Franklin felt the power of facts to make a vain man humble. He felt the normal human desire to save face after having expressed too impulsively his hypoth-

5. Osborn, *The Problem of Proof* (1947) 1. Mr. Osborn's first two chapters are especially worth reading in this connection. They are entitled, "Preparation on the Facts" and "Sifting the Evidence".

6. 1 *Wigmore on Evidence* (3d ed.), §1.

7. Coffey, "The Importance of Scientific Analysis of Evidence in the Prosecution of Crime", 11 *Ind. L. J.* 105 at 108 (1935).

8. See especially Chapter III.

9. Mason, *Brandeis: A Free Man's Life* (1946) 195 and 418.

10. Hornaday, "Some Suggestions on the Investigation of Facts", 15 *Ind. L. J.* 498 at 499 (1940). Mr. Hornaday of the Richmond Bar was formerly with the FBI. Mr. Bodin's *Marshalling the Evidence* in the Practising Law Institute Trial Practice Series is an excellent exposition on this subject.

11. Bosanquet, *The Essentials of Logic* (1928) 158.

12. Osborn, *The Problem of Proof* 22 ff.

13. See Huxley's famous letter to Charles Kingsley, Curtis and Greenslet, *The Practical Cogitator* (1945) 515.

14. Overstreet, *The Mature Mind* (1949) 80.

esis on an electrical theory.[15] Better that the lawyer be humbled at his office desk than at the counsel table!

Lack of recent information is probably responsible for more mistakes of judgment than wrong reasoning. In scientific analysis, age or antiquity does not lend cogency to any statement of fact. It is much more nearly true that the older the evidence is the more likely it is to be inaccurate. That is one reason why we have statutes of limitation. All evidence must therefore be subjected to the pitiless scrutiny of the latest investigation. Everywhere and everyday we see the development of new facts exploding old theories. It is important therefore that our analysis not only be based upon facts, but that it be based upon the most *recent* factual evidence obtainable.

Facts Must Be Appraised—They Are Not All Created Equal

After the facts have been collected and observed, they must be appraised. There is no democracy of facts. All facts are not created equal. They must be separately weighed, evaluated and classified. Here is where that priceless ingredient, a valued judgment, does its perfect work. This is where judgment, that rare ability to appraise things at their true value, comes into play. Judgment is an art and therefore cannot be embodied in a ready-made formula. This is where experience overwhelms theory. Here wishful thinking and rationalization must be suppressed. What do these facts prove? What is our deduction? Does it support the hypothesis of our case? Is there another or a more reasonable inference that we can draw from these facts? One great English advocate, by drawing from most incriminating evidence inferences based only on tone of voice, accent and punctuation, after a thorough analysis of *all* the facts, secured a verdict of "not guilty" of murder without the jury's retiring at all![16]

Viscount Haldane, one of England's great advocates and judges, has told us that long practice taught him to be accurate in the presentation of the facts and that in his later days he would have considered it a disgrace to be caught out not knowing any material fact of his case.[17] Louis D. Brandeis had a well-known passion for facts, more and more facts. He respected the logic of facts. "Common knowledge" was not enough for him; he wanted all the facts, not merely the common ones.[18] Facts, facts, facts—these were the only basis upon which he could properly exercise his knowledge.

Brandeis set certain axioms for himself regarding facts which in view of his eminent success are worth repeating. His maxims included:

> Know thoroughly each fact.
>
> Far more likely to impress clients by knowledge of facts than by knowledge of law.
>
> Know not only specific case, but whole subject. Can't otherwise know the facts. Know not only those facts which bear on direct controversy, but know all the facts and law that surround.

He made it a rule of his life that no one would ever trip him on a question of fact, and hardly anybody ever did![19]

Brandeis' belief in the primacy of facts was immortalized in the famous "Brandeis brief" in *Muller* v. *Oregon*,[20] a case in which the Supreme Court paid him the supreme compliment of mentioning his name in the text of the decision itself.[21] In Brandeis' *Muller* brief, only *two* scant pages were devoted to conventional legal arguments, but over one hundred pages were devoted to evidence to prove the *facts* in that case. Most unlawyer-like, but he won his case before a rather unsympathetic court![22] Brandeis' passion for facts drove even his friend Holmes to declare "I hate facts".[23]

Brandeis' desire for accuracy in his facts should not be undervalued. If one is detected in a mistake of fact, even in a matter wholly irrelevant to the basic issue in the case, that is unfortunate because it will lead to suspicions of inaccuracy in other more vital matters. If the lawyer can only state his facts in obscure or involved terms his statement is open to the criticism that it is either crudely prepared or just plain erroneous. Before we look up any law at all then, it is essential that we have a mastery of, not mere familiarity with, all the essential facts of the case.

"Analysis" and "Synthesis", the Twins of Logic

The logician gives the labels "analysis" and "synthesis" to operations by which means are selected and organized in relation to some purpose. That purpose can be—and in the law is—argument and persuasion. Intelligent activity is distinguished from aimless activity because the former involves the selection of means—analysis—of a variety of conditions that are present; and then their orderly arrangement—synthesis—in order to reach an intended aim or purpose, *e.g.*, persuasion by argument.[24]

As John Stuart Mill points out in his *Essay On Liberty*, facts to produce any effect on the mind must be brought before it. Very few facts can tell their own story without the comments and observations of an advocate to bring out their meaning. The

15. In a letter to Peter Collinson on August 14, 1747, he wrote: "On some further experiments since, I have observed a phenomenon or two that I cannot at present account for on the principle laid down in those letters, and am therefore become a little diffident of my hypothesis, and ashamed that I have expressed myself in so positive a manner. In going on with these experiments how many pretty systems do we build which we soon find ourselves obliged to destroy! If there is no other use discovered of electricity, this however is something considerable, that it may help to make a vain man humble.

"I must now request that you would not expose those letters; or if you communicate them to any friends you would at least conceal my name." Van Doren, *Benjamin Franklin's Autobiographical Writings* (1945) 51.

16. In the famous *Dyer* case, Sir Edward Marshall Hall did this. The defendant, an unwed mother charged with having murdered her illegitimate child, had admitted making the following statements: "How can anyone get rid of a baby?" and "I will tell you the truth. I killed it—I did not know what to do with it—I put it in a box; you will find it there." See Marjoribanks, *For the Defence* (1947) 115.

17. Haldane, *An Autobiography* (1929) 47-48.

18 Mason, *Brandeis: A Free Man's Life* 69, 250, 418.

19. *Id.* at 69. See Pearson and Allen, *The Nine Old Men* (1937) 178.

20. Freund, *On Understanding the Supreme Court* (1949) 50-51 and 86-87.

21. Mason, *op. cit.* at 250.

22. See Freund, *On Understanding the Supreme Court* 126, n. 12.

23. 2 Howe, *Holmes-Pollock Letters* (1946) 13. See Pearson and Allen, *The Nine Old Men* at 180.

24. Dewey, *Experience and Education* (1949) 105-106.

mark of a master lawyer to Holmes was this: that facts which before lay scattered in an inorganic mass, when the master advocate shoots the magnetic current of his own thought through them, leap into organic order, and live and bear fruit. Therefore, in Holmes' view, the main part of intellectual education was not the acquisition of factual knowledge, but learning how to make facts live.[25] That is the art of synthesis—of framing a persuasive argument, or a convincing, a winning presentation of proof. The lawyer's task is to synthesize the facts in the strongest, most effective and persuasive manner possible. Brandeis' method in marshalling his evidence was to build up his case from the particular to the general, weaving in the facts with an artistic skill, so that they presented a persuasive argument with apparent spontaneity.[26] Much of his power came from an infinite capacity for taking pains. This "drudgery" as Jefferson called it, is essential to successful advocacy—but it works![27]

Brandeis' method of arguing cases, he tells us, was "inductive, reasoning from the facts".[28] A good lawyer will not only argue from the facts, but he will disclose to the court the true facts. Former Dean Pound of Harvard Law School is such a lawyer.[29] It was an honest advocate who pointed out to the Supreme Court that the law on which the prosecution was based did not exist at all when he discovered this mistake.[30] The lawyer will not, of course, disclose facts that are his client's confidences even under a court's order to do so.[31] He will not weaken his argument or presentation by stating inferences as facts, or by citing evidence for a fact it does not prove.[32] The profession expects him to employ fairness and accuracy in his statement of the case, whether he is the lawyer at the Bar or on the Bench.[33] If a case turns upon some question of fact, nothing short of ultimate truth suffices. Neither authorities, however respectable, nor plausible arguments will excuse the lawyer from establishing that material fact.[34]

One of the most damaging mistakes counsel can make in his synthesis of his case is to overstate the facts. He should be confident in his presentation. He should studiously avoid "seller's talk" or "puffing". What is more devastating than to be found exaggerating or in error on an important date, quantity or speed? His hearers either believe that he is intentionally misrepresenting, or that he is insincere; or they conclude that if he is sincere, his powers of observation should not be trusted too far. Understatement, not of course uncertainty, is surely preferable.[35]

A judge is presumed to know the law. There is no basis for believing that he knows the facts until they are demonstrated to him. Judges have criticized some trial counsel for the lawyers' cardinal sin of being supremely ignorant of the facts of their own cases and therefore of little aid to the court or the jury.[36] Brandeis' success as an advocate—he traced prevarication to the White House itself![37]—was outstanding. His method of argument before courts, reasoning from the facts and not from legal theories, has much to commend it. That method is persuasive and effective.

Professor Fairman of Stanford Law School, himself a legal scholar with the highest respect for facts, has recently observed that it would be a wonderful improvement in our American public life if we learned to find our facts by searching, orderly, dispassionate inquiry before reaching conclusions.[38] Knowledge is certainly essential to understanding and comprehension, and understanding should precede judging.[39] We Americans are often inclined to believe that quick action is effective action. History proves too often that legislative haste may result in legal waste. The British could teach us here, perhaps. In respect to public questions their practice is, frequently, to remit the question to a Board of Enquiry. The personnel of such Boards are so selected that their findings are above political considerations. Parliament awaits the report of the Board of Enquiry before acting. Only then does the Government take the action which, in the light of the report, seems indicated.[40]

The Supreme Court of the United States has frequently reminded the

25. Holmes, "The Use of Law Schools" in *Speeches* 29.

26. Mason, *op. cit.* at 250.

27. "As a practising lawyer it has always seemed to me that many lawyers failed to appreciate the importance of the presentation of the facts either in their briefs or in the oral argument. They are so full of the facts of the case themselves and so anxious to argue the meritorious questions of law involved therein that they quite forget that the court has not grown up with the case and, indeed, knows nothing at all about them except as counsel may see fit to enlighten the court. If I have had any success over the years in the argument of appeals, I would attribute it, apart of course from being on the right side of the case, to a willingness to take endless pains to make the facts as clear as possible." Chief Justice Vanderbilt of New Jersey, "New Rules of the Supreme Court on Appellate Procedure", 2 *Rutgers L. Rev.* 1 at 27 (1948.)

28. *Business: A Profession* (1933) lv.

29. "It is not difficult to explain the ready acceptance of Pound's views by lawyers and judges. They have learned to trust the accuracy of his factual statements. He presents his views simply—without any pretense of supersophistication or any affectation of weird nomenclature." 57 *Yale L. Jour.* 1156 (1948).

30. See *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935), and Pearson and Allen, *The Nine Old Men* 247-48.

31. *Hickman v. Taylor*, 329 U. S. 495 (1947).

32. Vanderbilt, *op. cit.* 28.

33. See Fairman and Morrison, "Does the Fourteenth Amendment Incorporate the Bill of Rights?", 2 *Stanford L. Rev.* 5 at 80-81, 162 (1949).

34. See Fairman, "What Makes a Great Justice?", 30 *Boston Univ. L. Rev.* 49 at 85 (1950).

35. See Philbrick, *Language and the Law* (1949) 8-9.

36. Wellman, *Gentlemen of the Jury* 186 (1944).

37. See Mason, *Brandeis: A Free Man's Life* 275.

38. Fairman, "What Makes a Great Justice?", 30 *Boston Univ. L. Rev.* 49 at 60 (1950).

39. See Mr. Justice Brandeis' dissent in *Jay Burns Baking Co. v. Bryan*, 264 U. S. 504, 520 (1924).

40. The author is indebted to Professor Fairman for this information. (Letter of April 15, 1950).

41. "Unfortunately, in briefing questions of this character [social legislation] it has been the disposition of the Bar very generally to be content with the elaboration of legal formulas and the citation of authorities, without a painstaking examination of the fact situation which has given rise to the constitutional question.

"Lawyers, who, in the presentation of a negligence case, would prove with meticulous care every fact surrounding the accident and injury, in this field too often go little beyond the challenged statute and the citation of authorities in supposedly analogous cases. The court is thus often left to speculate as to the nature and extent of the social problems giving rise to the legislative problem, or to discover them by its own researches. Intimate acquaintance with every aspect of the conditions which have given rise to the regulatory problems are infinitely more important to the court than are the citation of authorities or the recital

Bar that painstaking examination of the fact situation is more important than the law involved.[41] Mr. Justice Miller was one of the Court's great judges.[42] He said, after twenty-five years on the Bench, that as a result of his own experience in the conference room of the United States Supreme Court, it surprised him how quickly judges could agree on the law and how frequently they disagreed on the facts.[43] Justice Miller's observation does not lack support in the Court's own reported decisions.[44]

There is merit indeed in the old Roman maxim that the law arises out of the fact—*Ex facto oritur jus.*[45] In conclusion, it may not be amiss to recall Francis Galton's famous story of Huxley and Herbert Spencer. "Spencer, during a pause in conversation at dinner at the Athenaeum, said, 'You would little think it, but I once wrote a tragedy.' Huxley answered promptly, 'I know the catastrophe.' Spencer declared it was impossible, for he had never spoken about it before then. Huxley insisted. Spencer asked what it was. Huxley replied, 'A beautiful theory, killed by a nasty, ugly little fact.' "[46]

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of bare formulas." "Fifty Years Work of the United States Supreme Court", Harlan F. Stone, 53 *A.B.A. Rep.* 259 (1928) at pages 271-72. And see Woodrow Wilson, "The Law and the Facts", 5 *American Pol. Sci. Rev.* 1 (1911).

42. See Professor Fairman's excellent portrayal, *Mr. Justice Miller and the Supreme Court* (1939).

43. "And I must say that in my experience in the conference room of the Supreme Court of the United States, which consists of nine judges, I have been surprised to find how readily those judges come to an agreement upon questions of law, and how often they disagree in regard to questions of fact which apparently are as clear as the law.

"I have noticed this so often and so much that I am willing to give the benefit of my observation on this subject to the public, that judges are not pre-eminently fitted over other men of good judgment in business affairs to decide upon mere questions of disputed fact." "The System of Trial by Jury", 21 *Am. L. Rev.* 859, 863 (1887).

44. For example, in the case sustaining the Federal Unemployment Compensation Law, Mr. Justice Cardozo for the majority pointed out "relevant statistics" showing that at times during the years 1929 to 1936 the unemployed sometimes reached 16 million or more. *Steward Machine Co. v. Davis*, 301 U. S. 548, 586 (1937). The 1930 census showed a national population of 122,775,036. Mr. Justice McReynolds supported his dissent on the theory of states' rights and said "Unfortunately, the decision just announced opens the way for practical annihilation of this theory; and no cloud of words or ostentatious parade of *irrelevant statistics* should be permitted to obscure that fact". 301 U. S. at 599. (Italics supplied).

45. 3 Bl. Comm. *329. Blackstone says: "And experience will abundantly show, that above a hundred of our law-suits arise from disputed facts, for one where the law is doubted of." *Id.* at *330. And see Brandeis, "The Living Law", reprinted in *The Curse of Bigness* (1935) 321.

46. Galton, *Memories of My Life* (1908) 258.

West Point Cadet Receives Association Award

■ At an impressive Military and Academic Awards Ceremony held at the United States Military Academy, West Point, New York, on June 4, Cadet William B. DeGraf was awarded the prize given by the American Bar Association to the graduating cadet who stands at the head of his class in the Academy's course in law. The award this year was a set of books in two parts, the first being Wigmore's *Panorama of the World's Legal Systems,* in three volumes, the second, Beveridge's *Life of John Marshall* in four volumes.

These volumes, in a sense, reflect the objective of the course in law given at the Military Academy. That objective is to impart to the cadet a thorough general understanding of the legal duties that confront the young officer in the Armed Forces. Particular emphasis is placed on the administration of military justice, the last part of the course being devoted to a study of the *Manual for Courts-Martial, U. S. Army.* Throughout the year-long course in law, short written tests are given, and it was on the basis of such tests that Cadet DeGraf attained his position as first man in law.

Cadet DeGraf was born and raised in San Francisco, evidencing early interest in the military profession by activity in his high school ROTC.

In 1943, he entered the Army and saw considerable action during the war as an infantryman. After participating in the invasion of Southern France, DeGraf received a battlefield commission as second lieutenant, as well as several decorations including the Combat Infantry Badge, Bronze Star with cluster and Purple Heart.

It was as an officer, then, that Cadet DeGraf took the oath administered to new cadets at West Point. Thus he renounced the privileges and status of an officer to become a lowly plebe at the Academy. During his four years he has been outstanding in his studies, wearing the collar stars of the Distinguished Cadet for each year. Other interests included rifle shooting and he has twice been a member of the second all-American rifle team. DeGraf also won the sectional championship and assisted the West Point rifle team to win both the sectional and national titles.

WILLIAM B. DeGRAF

During his senior year he was Cadet Commander of the First Regiment of the Corps of Cadets and graduated at the top of his class.

On June 10, after graduation, Lieutenant DeGraf married Miss Robin Wilde of California. He will be sent to Japan to join the 7th Infantry Division on occupation duty there.

John T. Loughran:

Chief Judge of the New York Court of Appeals

■ New York's highest court, the Court of Appeals, has long been known as one of the best common law courts of the country. The present Chief Judge is John T. Loughran, who has been a member of the court since 1934, and Chief Judge since 1945 when he succeeded the late Irving Lehman. This sketch of Judge Loughran is one of our series on chief justices of the highest state courts.

■ The court of last resort in New York is a tribunal of seven judges known as the Court of Appeals, which holds its sessions in Albany, the state's capital. The court was first established by the New York Constitution of 1846, originally as a bench of eight judges, and it recently observed its one hundredth anniversary. It replaced the former Court for the Trial of Impeachments and Correction of Errors, a large unwieldly body composed in part of lay members of the state senate.

Long renowned as one of the outstanding common law courts in the country, the Court of Appeals achieved probably its greatest reputation and influence during the eighteen years that the late Benjamin N. Cardozo served on it, first as an Associate Judge and then as Chief Judge. But the court's high excellence and prestige have continued since Judge Cardozo resigned in 1932 to take his place on the Supreme Court of the United States. Its great traditions have been carried on since that time, under the leadership of such successive outstanding Chief Judges as Cuthbert W. Pound, Frederick E. Crane, Irving Lehman, and its present presiding officer, John T. Loughran.

The jurisdiction of the Court of Appeals is carefully defined by the state constitution, which also fixes the general outlines of the state's entire judicial structure.[1] Generally speaking, an appeal from a court of original instance must first proceed through an intermediate appellate tribunal, known as the Appellate Division of the Supreme Court, before it can reach the Court of Appeals. The constitution specifies the classes of cases appealable to the Court of Appeals, and when such appeals may be taken as of right and when by leave of court. By way of further limitation, the constitution confines the court, except in specified situations, to the review of questions of law as distinguished from questions of fact.

The Judges of the Court of Appeals are chosen by popular election for terms of fourteen years each and they are eligible for reëlection. They cannot, however, serve as judges after reaching the age of seventy, but may be appointed thereafter as official referees.

Court Is Prompt in Handing Down Decisions

Though the Court annually disposes of a heavy load of appeals and motions, it has no problem of delay in the hearing or disposition of contested matters. Any appeal will generally be reached for argument within a month, or less, after the record on appeal has been filed; and the court is generally reasonably prompt in rendering its decisions, though it has been known to take longer than usual for the disposition of exceptionally difficult cases.

Of the seven judges of the court, three are from New York City and four from other regions of the state. All sessions of the court are held at the courthouse in Albany. But each of the Judges also has chambers in the city in which he resides and where he does his work when the court is in recess and where local lawyers can conveniently make application for stays and other intermediate relief. The court's usual routine is to alternate sessions of about three or four weeks each, with recesses of about equal duration. During the recesses the judges work on the various cases that have been argued.

Judges Work in Close Association

The judges of the court work together in close association, and their industry and wholehearted devotion to their tasks are proverbial. The nature and extent of their labors have been described by former Chief Judge Crane:[2]

> The method of our work and the conditions under which we work prob-

1. N. Y. Const., Art. VI.
2. 278 N. Y. vi—vii.

ably bring us into closer fellowship than is customary with other courts. During the four weeks' session of each term we live here in Albany. The majority of us dine together every day of the session. Every Tuesday, Wednesday and Thursday we are in consultation from half-past nine in the morning until one, followed by the court session from two until six. In the evening it has been customary for members of the court to work in their Chambers in the courthouse until late at night. It will thus be seen that while the court is in session the judges are together most of the day and evening. We get to know each other very well indeed. Virtues and faults cannot be hidden.

By tradition the consultations of the court are an outstanding feature of main importance to the work. They are quite formal. The judge to whom a case has fallen is expected to report fully upon all questions involved, and while making his report it is the duty of the Chief Judge to see that he is not interrupted no matter how long he may take. When he is through, the matter then passes to the next associate in rank who is accorded like treatment. By this method it has been found that every man is afforded full opportunity for self-expression and the indulgence of his own peculiar method of approach and attack. He is not cramped or frightened or dismayed by constant or boisterous interruption. The calmness of the discussions which never in my twenty-one years have exceeded parliamentary language, affords reason its proper domain. Excitement, feelings and emotions, experience has taught us are apt to deter good judgment. . . .

It has been observed that the high caliber of the Judges of the Court of Appeals and the manner in which they work together, each conscientiously giving every case before the court the full benefit of his independent study and judgment, make it impossible for any one judge to dominate the court's discussions or decisions. Former Chief Judge Lehman has written that even Judge Cardozo, though exercising an immeasurable influence on his associates, did not dominate the court of his day and on occasion appeared in the rôle of dissenter.[3]

The present judges of the court, besides Chief Judge John T. Loughran, are, in the order of seniority, Edmund H. Lewis (Syracuse), Albert Conway (New York City), Charles S. Desmond (Buffalo), Marvin R. Dye (Rochester), Stanley H. Fuld (New York City), and Charles W. Froessel (New York City). Judge Froessel was elected to the court in November, 1949, replacing Judge Bruce Bromley.

Chief Judge Loughran Is Graduate of Fordham

John T. Loughran was born in Kingston, New York, on February 23, 1889. After graduating from the old Kingston Academy in 1907, he worked for about a year as a newspaper reporter on one of the local newspapers and then decided to seek a career in the law. Matriculating at Fordham Law School in New York City in 1908, he received his law degree from that school in 1911. He graduated *summa cum laude* and was selected to deliver one of the student addresses on commencement day. He has since then been awarded the honorary degree of LL.D. by Fordham University (1925), St. John's University (1934), Syracuse University (1946), Siena College (1948), and Hobart and William Smith Colleges (1948).

He was married in 1915 to Miss Cornelia Brodhead, who died in 1938. He has one son, John B. Loughran, a lawyer now engaged in practice in New York City.

Judge Loughran was admitted to the New York Bar in 1911 and engaged in practice originally in Kingston until 1922 and then in New York City. He remained in practice until his election in 1930 as a Justice of the New York Supreme Court. In 1934 he became an Associate Judge of the Court of Appeals, and he was elevated to the position of Chief Judge on September 28, 1945, upon the death of the former Chief Judge Irving Lehman.

For eighteen years prior to his election to the Bench, Judge Loughran was a member of the faculty of Fordham Law School as well as a practicing lawyer.[4] He was first appointed to the teaching staff of Fordham Law School in 1912, at the age of 23, but one year after his graduation therefrom. He became an associate professor in 1915, and a full professor in 1916. During this eighteen year period, Judge Loughran established his name as one of the outstanding teachers of law. At one time or another he taught some eleven different courses, running the gamut of a large part of the standard law school curriculum, including adjective as well as substantive law. He also edited several casebooks, and wrote a number of law review articles.

Phenomenal Memory Serves Him Well as Judge

His phenomenal memory, which enabled him to cite cases by title and volume and page and even to quote from memory *verbatim* passages of opinions, was proverbial among his students. That memory has also served him well as a lawyer and as a jurist.

In addition to his teaching, Judge Loughran carried on an active and distinguished law practice, and was often called upon by other lawyers for aid in handling their appeals. He briefed and argued many important appeals before the New York Court of Appeals and the Supreme Court of the United States as well as before intermediate appellate courts.

Apart from these achievements, his great charm and graciousness of manner, and gentleness of character, combined with a deep humility and considerateness for others, have endeared him to the thousands of persons who have come in contact with him, whether as students, associates or lawyers appearing before him. Judge Loughran's kindly and gentle manner is comforting and reassuring to every lawyer who argues before the Court of Appeals. At the same time he presides over the court with due firmness, limiting counsel to their allotted times for argument and keeping the calendar on an even keel.

As Chief Judge, Judge Loughran is the administrative head of the

3. See Lehman, "Judge Cardozo in the Court of Appeals", 39 *Col. L. Rev.* 12, 17 (1939).

4. See "John T. Loughran—An Appreciation", 4 *Fordham L. Rev.* 167-185 (1935); articles by former President Aloysius J. Hogan of Fordham University, former Surrogate James A. Delehanty, and Dean Ignatius M. Wilkinson of Fordham Law School.

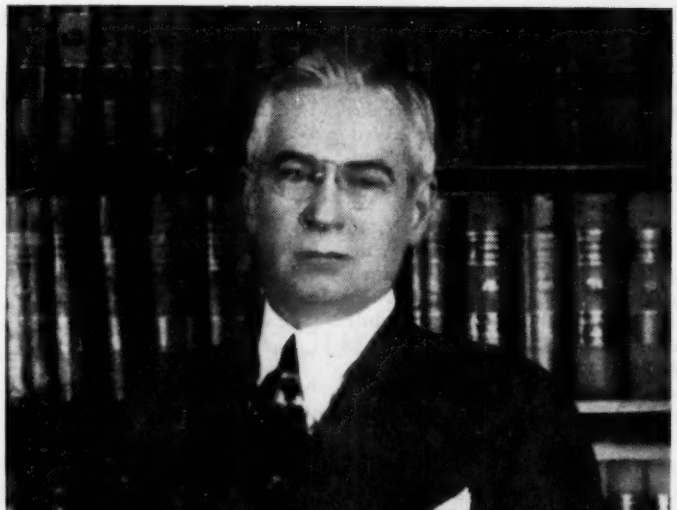
court and is called upon to oversee its efficient functioning and to attend to a host of administrative details.

He is also, by virtue of his office, chairman of the State's Judicial Council, an official body representative of the Bench, Bar, legislature and public, whose function it is to make a continuous survey and study of judicial administration throughout the state and to recommend to the legislature any changes which it deems advisable in judicial organization, jurisdiction or procedure. The Judicial Council has been responsible for initiating a number of important reforms in judicial administration and procedure since its creation in 1934.

In addition, the Chief Judge is, *ex officio,* the presiding officer of a newly created "Court on the Judiciary", a tribunal set up by a constitutional amendment of 1947 to hear charges for the removal of any judge in the state for cause or for the retirement of any such judge for mental or physical disability preventing the proper performance of his duties.

In September, 1949, Judge Loughran was named to a special five-member council of the newly-organized Conference of Chief Justices of the several states. The function of the council is to inquire into possible methods of simplifying and reducing the cost of appellate court procedure and to report thereon at the next meeting of the Conference to be held in Washington in September in connection with the Annual Meeting of the American Bar Association. Judge Loughran's many years of expert study of problems of appellate procedure in his own state make him especially well qualified to serve the Conference and its Council.

Judge Loughran is always available to speak with any lawyer or litigant who has a grievance or seeks information. As Chief Judge, he also receives letters of inquiry or complaint from prisoners who are unable to afford counsel and he conscientiously answers all such letters. In appropriate cases he has tried to help prisoners by advising them of their rights and by having the court appoint counsel to handle their appeals in the court without fee.



JOHN T. LOUGHRAN

He is an able and interesting speaker, and is constantly being asked to address various group functions. He has indeed been compelled to curtail the number of his appearances at such affairs because of the excessive demands on his time.

In church affiliation he is a Catholic, and in politics he is a Democrat. Attesting to his immense popularity is the fact that he was elected for a full term as Chief Judge in November, 1946, upon the nomination of all the major political parties in the state.

Judge Loughran's Opinions Show His Ability

The large number of opinions that Judge Loughran has written in the sixteen years he has been on the Court of Appeals Bench, printed in some thirty-six volumes of the New York Reports, affords some measure of his greatness as a jurist.

His opinions reflect his acuity and directness of thought and his integrity and maturity of mind, as well as his humaneness and innate sense of justice, and his knowledge and appreciation of the human relationships and of the political, social and economic factors that often figure in litigated cases. Also evident is the vast store of legal learning on which he draws in his work and which is the product of his extensive background as a law professor, practicing lawyer, and trial and appellate judge. Added to these qualities are the painstaking care and industry with which he applies himself to the study of the record and the law in every case that comes before the court.

Judge Loughran's opinions are notable not only for their learning, persuasiveness and directness but also for their stylistic structure. They exhibit a facility and pithiness of expression that avoid prolixity and florid metaphor while displaying a full, rich style. His words are carefully chosen for preciseness and clarity and the emphasis throughout is on a clear, straightforward discussion and resolution of the issues presented by the particular controversy in relation to the general body of the applicable law.

His opinions are written with great persuasive force, and their reasoning is well buttressed by references to facts in the record, where appropriate, as well as to legal authority. The factual situation in the case is the pivot on which the decision is made to turn and on the basis of which he will discuss the legal issues essential to decision. The pertinent decisional or statutory law is searchingly analyzed and he will often trace a long established common-law rule or statute back to its very origin to ascertain its underlying purpose and principle. At the same time his opinions evidence an essentially practical approach and a striving for greater simplicity in the formulation and application of legal doctrine and the elimination of needless and confusing technicalities and fictions.

He has the faculty of being able to reduce the most complex set of facts to an accurate, simple and concise statement without omitting any essential item and in such a manner as to highlight the basic issues. A résumé of facts that may consume many pages in counsel's briefs he will set forth clearly in a few paragraphs.

His discussion of legal doctrine is marked by similar clarity and accuracy of statement. Where decision in a novel situation requires a choice between competing precedents or considerations of policy, the reasons for his preference of the one or the other precedent or policy are lucidly and cogently stated. He is never guilty of giving a purely one-sided view of the issues in a case, and indeed generally sets forth the countervailing contentions in their strongest possible light before proceeding to answer them.

He takes care to point out any necessary limitations on the scope of a decision, and, in an appropriate case, will state that the exact nature of such limitations must await clarification in future litigation. He eschews loose dicta and generalizations and will often make it clear in his opinion that the court is not passing on some issue which either is not squarely presented or is not controlling.

Ever respectful as he is of the opinions of others and alert to the dangers inherent in hasty conclusions, his decisions are the product of the fullest deliberation and consideration of all facets of the issues involved and of the consequences of a decision either way.

Judge Loughran Defines Ideal Judge

In an address which he delivered in 1936 before the New York State Bar Association,[5] shortly after his elevation to the Court of Appeals, Judge Loughran, in his well-known modest manner, referred to the doubts and perplexities that often beset even the ablest of judges in the process of deciding cases, and expressed the debt owed by the Bench to the skill and industry of contending counsel. Speaking from his own experience, he stated that "nothing can contribute more for peace of mind than the moderating assurance which comes from a consciousness that one has at least patiently heard and examined all that was urged on both sides of the controversy". Further emphasizing the function played by counsel, he suggested that the ideal judge was one "who gives to his work all the best of his mind and heart and physical resources, and who becomes great only by concert with the Bar who labor with him".

His opinions, however, often give evidence of legal scholarship and research far beyond the aid afforded by counsels' briefs and on occasion even the decisive issue is one which counsel have minimized or even completely overlooked.

Judge Loughran has written noteworthy opinions in a great variety of cases, cutting across almost every area of state court litigation. Many were rendered in cases of first impression, in which it was necessary to choose a rule of decision for a novel situation.

Illustrative of his approach to a problem of first impression is his opinion in *Sheehan* v. *North Country Community Hospital*, 273 N.Y. 163. The question was there squarely presented for the first time in the Court of Appeals whether a charitable hospital should be declared exempt from liability to a paying patient for personal injuries suffered by the patient by reason of the negligence of the hospital's ambulance driver. Masterfully weighing and resolving the competing policy considerations, Judge Loughran ruled against exemption from liability in such a situation. His reasoning was set forth in a short opinion as follows:

> The case for immunity must rest on the hypothesis that a recipient of the benefit impliedly waives any claim for damages resulting from torts in the administration of a charity, a theory that would be inapplicable were the plaintiff a stranger to this hospital. . . . [citing cases]. A prop may be found in the consideration that to compel payment of damages to a beneficiary would be to limit charitable activities and to dry up the sources of charitable donations. In a case not quite the same, the strongest argument for nonliability was stated in these words: "There can certainly be no principle of natural justice which would require one engaged in charitable work to be liable to the recipients of his charity for the wrongs of others. If he use reasonable care in the selection of the means and is guilty of no wrong himself, he ought not to be answerable to those who accept the charity for the wrongs of servants whom he has to employ to make it effective." (*Wallace* v. *Casey Co.*, 132 App. Div. 35, 44).
>
> On the other side it is answered that the "waiver" doctrine is pretty much a fiction (*Phillips* v. *Buffalo General Hospital*, 239 N. Y. 188); that to impose liability is to beget careful man-

(Continued on page 597)

5. Report N. Y. St. Bar Ass'n (1936), pp. 376-380.

American Criminal Law as It Is Taught in Russia:

A Translation from a Soviet Textbook

by Serge S. Gorny

■ In this unusual article, American lawyers and laymen will see American criminal law, of which they are justly proud, through the distorted eyes of the Ministry of Justice of the Union of Soviet Socialist Republics. As Mr. Gorny explains in his introduction, the article is a translation from a Russian textbook on criminal law designed for Soviet law students. It is ample proof—if any proof is needed—of the tremendous distance separating the mentalities of the Western world and the lands behind the Iron Curtain.

Mr. Gorny learned Russian as a child from his family who emigrated from Russia after the Bolshevik Revolution. He studied it in college and had further training in the language when, as a captain in the Marine Corps, he attended the naval language school at Boulder, Colorado, in 1946. He served as Russian language officer in the G-2 Section of the First Marine Division at Tientsin, China. A recent graduate of the University of Washington School of Law, Mr. Gorny was part-time library attendant as a student, and was in charge of the acquisition of Russian material for the law library which is building a collection of Russian legal material. In April, Mr. Gorny was appointed to the staff of the Prosecuting Attorney of King County (Seattle), Washington.

Mr. Gorny notes that he has at times used awkward English in translating the Russian text in order to convey the spirit of the original. In a completely free translation, he explains, the "propagandistic and unfounded nature of the basic assumptions of the author would lose their effect".

■ The following article is a translation of pages 36-40 of *Ugolovnoe Pravo, Obshchaia Chast' (Criminal Law, General Part)*, a text issued by the All-Union Institute of Juridical Sciences of the Union of Socialist Soviet Russia and published by the Ministry of Justice of the U.S.S.R. in 1948. This book is approved by the Ministry of Higher Education of the Soviet Union as a text for juridical faculties and juridical institutes (law schools).

In their earlier legal texts the Soviet writers have, of course, been critical of the legal systems of the Western democracies, but it could be said that, viewed from the standpoint of their political philosophy, they were objective in their short analyses. In some of the texts written during the last war they even commented favorably on what they considered to be the more acceptable aspects of Anglo-American law. However, this most recent text indicates a new tendency of vicious, propagandistic attacks on our law.

As pointed out in recent articles written by Mr. Hazard[1] and Mr. Berman[2] (these articles are especially excellent because of the high degree of objectivity in their analyses of the various aspects of Soviet law), Soviet law is becoming more formal and more stable. It should be easier for our lawyers to understand their law because it is reverting to legality and orthodoxy. However, the policy apparent in this recent Soviet text will make it harder for the Soviet lawyer to understand us and our laws. A person whose knowledge (or rather, lack of knowledge) is based upon such spurious misrepresentations of our legal system could never understand that system. It appears that, as in other fields, the gulf between the legal professions of the two countries is going to be increased instead of decreased.

Sergius Yakobsen, Consultant in Russian Affairs for the Library of Congress, writing in that agency's *Quarterly Journal of Current Acquisitions*[3], states that Soviet legal scholars are having difficulties in writing purge-proof college textbooks, and that certain authors were severely reprimanded for various practices, among them "failing to criticize the United States and other democratic countries". That these purges and reprimands are taking effect is evidenced by this latest official legal text on criminal law. The writers do not stop at "criticism" but go on to

1. John N. Hazard, Professor of Public Law, The Russian Institute, Columbia University.
2. Harold J. Berman, Assistant Professor of Law, Stanford University School of Law.
3. The Library of Congress, 6 *Quarterly Journal of Current Acquisitions* (February, 1949), page 51.

abusive perversion of our law and the ideology behind it.

It is to be noted that the translated excerpt is not merely a part of a larger section on our criminal law but is the complete description, in this book, of our law. The only other references to the criminal law of the United States are made in the discussion of specific aspects of Soviet criminal law and are unfavorable comparisons of our law to theirs. [The subheads in the translation, of course, were added in the editorial office of the JOURNAL and do not appear in the original Russian text.]

The Criminal Law of the U.S.A.

■ American criminal law manifests itself as a relative of English criminal law. It was introduced into America as early as the seventeenth century by the Puritans who, having been persecuted in their native land for their religious convictions, emigrated from England. English criminal law, almost in its entirety, became the law of so-called New England, and later of the U.S.A.

In the constitutions of several American states it is plainly directed that the common law of England is the source of the criminal law of these states. The criminal codes, published in several states, and likewise the federal criminal legislation of the U.S.A. is influenced by the English common law.

The federal criminal legislation of the U.S.A. provides for only a limited number of crimes. However, in the period following World War I and especially during and after World War II, one detects a tendency towards the increase in the number of federal criminal statutes.

A number of criminal codes, published in individual states, and the Federal Criminal Code of 1909 evidence the fact that American law, in contrast to English law has taken the path towards codification of criminal legislation. At the same time the criminal law of the U.S.A. remains fundamentally the local law of the several states and only to a limited degree appears as all-American federal law.

Indefinite Sentences Are "Reactionary"

In its fundamental principles American criminal law is analogous to English common law. However, in the field of punishment one must note the widely prevalent, highly reactionary system, peculiar to the U.S.A., of indefinite sentences. The maximum terms of indefinite sentences are sometimes so high (more than fifty and up to ninety years) that they virtually mean life imprisonment or a surreptitious form of execution by slow death.

In a number of states the death sentence is carried out with the help of the electric chair or the gas chamber. A number of states employ sterilization as a punishment, *i.e.*, a medical operation depriving the one subjected to it of the possibility of having issue.

With an aim of making war on revolutionary movements in the U.S.A. individual laws are enacted in which the actual goal is hidden under various general titles. The Sacco-Vanzetti trial, the Mooney affair and others, evidence the fact that the ruling classes of the U.S.A. utilize every possible device in their war against revolutionary movements, even to the point of using laws directed towards the struggle against crime.

The actual, and to some extent the legal inequality of Negroes (discrimination) in the U.S.A. finds its expression in the field of criminal justice in the merciless application of the most grievous criminal laws to the Negroes (an example is the notorious trial of the Negro youths from Scottsboro, which evoked a wave of protest in the U.S.A. and Europe), and to the present day the lynching of Negroes goes unpunished. Submitted more than once by the progressive elements, the enactment of a special statute on criminal prosecution for lynching invariably ended in failure.

Adopted in 1933 and formally directed towards the struggle with criminal traitors to the state, the new law *re* state secrets actually made possible, under the pretext of the safeguarding of state secrets, the prosecution of the opposition and the workers' press, which was exposing the secret machinations of the ruling classes. This law turned out to be a weapon in the Reaction's struggle against the Communist press and its courageous and honest exposition of the criminal machinations of the reactionary groups and their defenders in the governmental agencies.

American Policy "Opposes Working Man"

Upon the conclusion of World War II the U.S.A. is openly adopting an expansionist policy, calculated "towards the struggle against the U.S.S.R., against the countries adopting the new democracy, against the working man's movements in all countries, against the working man's movements in the U.S.A., against liberating, anti-imperialistic forces in all countries".[4]

This new policy in foreign politics appeared in the open prosecution of a reactionary, antipopular, and antiworker campaign that expressed the interests of the expansionist circles of the U.S.A. Various proposals of antiworker laws are being introduced in the U. S. Congress. In 1947 the reactionary, antiworker Taft-Hartley law was enacted. This law forbade the system of so-called "closed shops", *i.e.*, the hiring of trade-union members only, and opened up wide opportunities for strikebreakers. It limited the right of collective bargaining; permitted industrialists to initiate lawsuits against unions on any pretext, tying up the latter with large expenditures; and sharply restricted the right to strike. It forbade the unions to make contributions to political campaigns or to spend their resources to conduct political campaigns for the election of the President or members

4. A. Zhdanov on the international situation. Informational consultation of delegates of the Communist Party in Poland at the end of September, 1947, 1948, page 20.

of Congress. The exercise of this same right to finance election campaigns became the definitive, indivisible privilege of monopoly.

The Taft-Hartley Act also appears as an anti-Communist bill. It established that trade-unions wishing to be officially recognized must expunge "Communists" from leadership in the union (actually the U. S. authorities can declare any public worker or social worker belonging to the opposition to be a "Communist").

"Progressive Elements" Are "Persecuted"

Under the banner of the struggle against "Communism" such progressive organizations as the "Scientific Investigational Association in the Field of Labor"[5] or the "American Youth Organized for the Struggle for Democracy"[6] are persecuted and proclaimed "subversive".

American reactionaries have adopted the policy of applying repressive legislation to the Communist movement in the U.S.A. There was an agency in Congress called the "committee on investigation of anti-American activities", which among the democratic circles was appraised as the "original inquisition, heretofore nonexistent in America".

In March, 1947, an order was issued to check on all government employees of the U.S.A. and to fire those who were found to be disloyal, or in other words, those who were suspected of belonging to, or being sympathetic to, the Communist or other democratic organizations, 2,300,000 government employees are subject to the check. The activity of the agency is actually directed against every democratically inclined American who does not agree with the policies of the war-mongers. One of the progressive American periodicals characterized the agency as the "little terror, counting upon frightening little people. It works. One can thoroughly and effectively suppress a person without resorting to law".

Repression of persons having any kind of relation to Communism takes on the most varied forms. Thus, in 1947, one of the committees of the House of Representatives adopted a resolution to exclude anyone "having any connection with the Communist Party" from the rights incidental to demobilization.

In violation not only of the laws of the U.S.A. but also of international agreements American imperialists do not cease in their persecution of Communists.

The U.S.A. was always a country having a large criminal element. After World War I the increase in crime in the U.S.A. took on especially large proportions. Thus in thirty cities in 1915 the number of murders alone was 1614, while in 1927 it was 2340. From 1920-1930 the number of crimes committed rose 50 per cent. Even in 1934 the number of professional criminals in the U.S.A. was estimated at 400,000. In 1937 for every 100,000 persons, there were 158 in prison, whereas in England the number was 29.9 persons. In respect to the number of persons in prison, only Hitler's Germany, where in 1937 there were also 158 per 100,000 (not counting the concentration camps), can compare to the U.S.A. In 1931 the people of the U.S.A. lost sixteen billion dollars as a result of crime. The growth of crime in the U.S.A. is not diminishing even at the present time. According to the statistics of the Federal Bureau of Investigations crime continues to increase without change from year to year. The number of murders in October of 1946 increased 32 per cent in comparison to the same period in 1944, the number of robberies—38 per cent. Six million Americans were arrested.

Starting only a few decades ago the "youthifying" of criminals continues to the present time. In 1931, 73 per cent of the persons accused of serious crimes were 17-22 years of age. Crime was already the fate of youth. Since 1939 the number of girls up to 18 years of age, who were arrested increased 198 per cent while the number of boys under 18 arrested during the same period increased 43 per cent for murder, 60 per cent for rape, 39 per cent for robbery, and 55 per cent for automobile theft.

"Ruling Classes" Repress Citizens "To Protect Property"

This large growth of crime, especially crimes against property, incites the ruling classes of the U.S.A. to excessively increased repression. Even in the thirties of the twentieth century special laws were enacted in New York and other states, increasing punishments for repeated convictions for robberies and other crimes against property. By these laws a person convicted for the fourth time for a so-called felony (robbery, etc.) was sentenced, regardless of the character of the person (for robbery regardless of the sum), to life imprisonment, which sentence the court could not commute to a lesser term. According to the law *"Re* repeated crimes", a person convicted of any felony for the second time is sentenced to prison for a term not less than the maximum penalty established by law for that crime and can be sentenced to a term as high as twice the maximum. For the fourth crime a life sentence in prison, without chance of parole, is imposed. If after conviction it is discovered that a person is a recidivist the sentence can be vacated in order to increase the punishment.

However, the keen edge of all such laws is only used against the petty and the accidental thief.

America is a land of organized crime and of intimate ties between the big criminals and the heads of the Administration. Criminal organizations, headed by big-scale bandits, enjoy complete immunity in the U.S.A. Bribery, of a cynically open nature, is not the only basis for the connection between criminal organizations and the higher-ups of the government, and for the complete immunity of big gangsters; criminal organizations take part in the political life of the U.S.A. Being connected with bankers, large industrialists, and reactionary political leaders, they organize strikebreaking; terrorize voters during elections, forcing

5. Translator's guess—Labor Research Association, Inc.

6. Translator's guess—American Youth for Democracy.

them under fear of beatings to vote for designated candidates; put undesirable leaders out of the way, etc. In answer to the question why he, possessing a fortune of seventy billion dollars, doesn't quit his activities, the biggest bandit of them all and the head of the Al Capone criminal gang, said "The biggest bankers, industrialists, politicians and trade-union leaders are trying to get me to continue my activities". In the U.S.A. the situation, in respect to the struggle against crime, has long ago reached the point which a former Chief Justice of the U.S. Supreme Court characterized as a "disgrace to our civilization".

American Law Institute Holds Twenty-Seventh Annual Meeting

by Marvin Schwartz

▪ The Uniform Commercial Code, a project that has been described by its proponents as "the most comprehensive act dealing with commercial law that has ever been prepared in any English-speaking jurisdiction", has been slated for final adoption by its sponsor organizations in May, 1951. This action on the Code, which has been in preparation for more than five years, was taken at the twenty-seventh annual meeting of The American Law Institute, held jointly with the National Conference of Commissioners on Uniform State Laws in Washington on May 18, 19 and 20.

It had originally been planned to submit the Code for final approval at this spring's meeting, but a resolution adopted instead noted that many suggestions are still being received by the Code editorial board from bar association committees and affected business groups. The resolution also noted that many interested groups had requested additional time for study of the Code.

It was decided to call another joint meeting of the Institute and the National Conference on September 15 and 16, 1950, in Washington, for consideration of such further matters as the Code editorial board might wish to submit, and in order to assure consideration by that board of all suggestions and comments that are offered, its membership was enlarged by ten.

The resolution expressed the hope that the Code, in final form, will be printed early in 1951 and be submitted for endorsement to the House of Delegates of the American Bar Association in the fall of 1951. All groups interested in the Code were urged to forward their suggestions to the editorial board at the earliest possible date.

Chief Justice Fred M. Vinson spoke at the opening session of the Institute meeting on May 18 and Senator Paul H. Douglas of Illinois addressed a dinner meeting on the evening of May 19. The remaining sessions, attended by almost 700 lawyers, law teachers and judges, were devoted to discussion of policy questions raised by the Commercial Code and the Institute's proposed federal income tax statute.

The Commercial Code was under discussion for three full days, with the editorial board submitting to the joint meeting the many policy questions raised during the year by groups that have studied the Code. The meeting was also requested by the board to reconsider policy issues that had been passed upon at previous sessions. The editor-in-chief of the Commercial Code is Professor Karl N. Llewellyn of Columbia University Law School, and the associate editor-in-chief is Miss Soia Mentschikoff of New York. The editorial board is headed by the Institute's director, United States Circuit Judge Herbert F. Goodrich of Philadelphia, and the board members are John C. Pryor, of Burlington, Iowa; William A. Schnader, of Philadelphia; Harrison Tweed, of New York; and Professor Llewellyn.

Two days of discussion were devoted to the income tax project, the chief reporter for which is Professor Stanley S. Surrey of the University of California School of Jurisprudence. William C. Warren of the Columbia University Law School is associate chief reporter. Listed as special consultants are John M. Maguire of Harvard Law School; J. Rex Dibble of Loyola School of Law; Edwin S. Cohen of New York; and Thomas N. Tarleau, also of New York. Members of the Institute's tax policy committee are Norris Darrell of New York; Lawrence E. Green of Boston; Erwin N. Griswold Dean of Harvard Law School; Robert N. Miller and Randolph E. Paul, both of Washington; and Paul G. Rodewald of Pittsburgh. Maurice Austin of New York is a special adviser on accounting matters.

Elected to the Council of the Institute were Robert N. Miller of Washington and Joseph F. Johnston of Birmingham, Alabama. Mr. Miller was elected to a nine-year term along with the following, who were re-elected: Dillon Anderson, Fletcher R. Andrews, Herbert W. Clark, Norris Darrell, Edwin D. Dickinson, Earl G. Harrison, Augustus N. Hand, Learned Hand, Laurance M. Hyde, William L. Marbury, Eugene B. Strassburger, Thomas W. Swan and Floyd E. Thompson.

Mr. Johnston was elected to a term expiring in 1956.

United States Circuit Judge Her-

(Continued on page 557)

Bar Association Activities:

Suggestions for Bar Association Executives

by Glenn R. Winters • Secretary-Treasurer of the American Judicature Society

■ In this article, the Secretary-Treasurer of the American Judicature Society offers suggestions to executives of the organized Bar for improving and expanding their activities. Mr. Winters divides the work of bar associations into three parts—activities necessary to the life of the association itself, service to members and service to the public. He tells what bar associations over the nation are doing in these three phases of work. While the suggestions he makes are directed primarily to the leaders of the organized Bar, Mr. Winters stresses the fact that the work of the bar associations, national, state and local, is the duty of every member of the legal profession.

■ The following outline of suggested state and local bar association activities was compiled at the request of President Harold J. Gallagher of the American Bar Association for distribution at the Conference of Bar Association Presidents held Saturday, February 25, 1950, at the Edgewater Beach Hotel, Chicago. Most of it is drawn from the file of applications for the American Bar Association Award of Merit, of which the author has custody as librarian of the Section of Bar Activities; but much of it is from other sources as well, including personal contacts with active bar associations throughout the United States and Canada, and especially a recent regional conference of bar association secretaries held under the auspices of the Conference of Association Secretaries of the Section of Bar Activities together with the Ohio State and Columbus Bar Associations in Columbus, January 27 and 28, where speakers from organizations outside the legal profession offered many constructive ideas applicable to bar associations.

These suggestions are not exhaustive, nor could an exhaustive list ever be drawn up, for services must be responsive to needs and needs vary from place to place and from time to time. Neither is the order in which these items are listed indicative of the author's or anybody else's appraisal of their relative importance, for factors of convenience and subject grouping have largely determined their sequence.

Every idea herein described has been tried and found feasible and worthwhile by some organization although it has not been possible in every instance to give credit to those who originated them or even to more than one or two of those now applying them to advantage. There is no organization so situated that it could possibly engage in every one of these activities. Some of them are applicable only to state associations, some to local and some to both. No attempt has been made to sort them on that basis. It is for each bar executive to look them over and determine for himself which of them would be suitable and advantageous for his organization to undertake.

A complete manual of procedure for each activity mentioned would extend this paper to book length, and discussion has been restricted to a few descriptive paragraphs and suggestions as to where further details may be obtained. If some bar organizations find here some ideas that can be used to improve their services to their members, to the public and to the organized Bar, our purpose will be achieved.

First Activities Discussed Resemble "Basal Metabolism"

There is a medical term that may aptly be used to describe the bar association's services to itself as an organization. Metabolism is the bodily process of converting food into energy. *Basal metabolism* is the bare minimum necessary to keep the organism itself alive, and beyond that is the manufacture of additional energy for use in carrying on the activities of life. The bar association activities we are to mention first are its basal metabolism—those by which it merely keeps itself alive and functioning, but not primarily rendering services to the profession, the public or anybody but itself although of course some of them do have such an effect besides. That is not to say that they are not important—in fact, they are a prerequisite to most of the

others and that is why we mention them now.

1. *Membership.* The first requisite of any membership organization is that it have as many members as possible. Some organizations—the Communist Party, for example—have the whole wide world to draw from, but any bar association is limited to the lawyers and judges within its territorial boundaries. This still leaves a wide field for a national organization such as the American Bar Association or the American Judicature Society, but some state and most city Bars have a fairly low ceiling on their maximum possible membership. It is correspondingly important that they enroll as many as they can. Every one of the services hereinafter mentioned is a part of that effort, but, granting an adequate service program, there are certain things to be done to make the most of the membership possibilities.

A. *The invitation.* Broadcast appeals may be profitable where there is a large or unlimited field to draw from, but when the field is limited every contact must be as effective as possible, and this means, of course, an individual invitation. Every eligible nonmember should be invited, not so often as to antagonize him, but often enough to keep him reminded and to emphasize that he is really wanted. Once a year is not too often for any state or local bar association. The invitation should be as sincere and personal as possible. Face to face is best, or by telephone. If neither one is feasible, let it be by personal letter, not printed or mimeographed, but individually typewritten and personally signed. Letter shops can produce such letters in quantities for about ten cents each, depending on their length, and the money spent for them is a good investment. Invitations may be extended by members, but for maximum weight and dignity they should be signed by the president.

B. *The endorsement.* The pulling power of an invitation will be tripled if it is accompanied by an endorsement letter from some member who has a personal connection with the invitee. The American Judicature Society uses another individually typewritten and separately mailed letter for this purpose; the National Legal Aid Association is having the invitation extended by the sponsor and enclosing with his letter a message from the president.

C. *The enclosures.* A printed leaflet explaining about the organization and the reasons for joining should be enclosed. An excellent one is being used by the Columbus Bar Association. There should also be an acceptance blank.

D. *The follow-up.* Returns from any mailing will be increased by 50 to 100 per cent by a follow-up letter from the secretary or whoever receives the acceptances, calling attention to the fact that this one has not yet come in and enclosing another blank.

Members Must Be Held as Well as Won

2. *Publications.* Members must be not only won but held. A small fixed percentage is lost each year from deaths, resignations and delinquencies. How many of the latter there are is determined somewhat by the contact that is maintained with the members. Here again, services are important, but the chief avenue of contact between any organization and its members is bound to be the periodical publication, or the bar journal. A few state associations still put out an expensive bound volume of annual proceedings and get along without a bar journal, but their number is diminishing. The newest bar journal is the *West Virginia State Bar News,* the first issue of which came out in January, 1950.

Associations to which the expense of publication is a stumbling block are advised to examine *The Subpoena,* monthly publication of the San Antonio Bar Association. This is composed on the Vari-Typer typewriter, which permits use of a variety of type faces and the making of even right-hand margins, and is printed by the photolithograph process at a cost much lower than ordinary letterpress printing. Facilities for this type of production are available in every city, and *The Subpoena* is as nice-looking a bar journal as one could ask for. The quarterly journal of the Louisiana State Bar Association is done in the same manner on a larger scale.

A. *Subject matter.* Some bar associations publish what amounts to a law review, sometimes in coöperation with a law school. Such a publication may be needed, but it does not take the place of a bright and readable sheet with news of bar activities and personalities, interspersed now and then with a legal essay. The Minnesota State Bar Association's *Bench and Bar* does an excellent job in this respect.

B. *Other publications.* The New York State Bar Association is one of several that publish a regular legislative reporter during sessions of the state legislature. The state associations of Ohio, Oklahoma and some other states publish, either separately or in the bar journal, advance sheets of supreme court reports. The Ohio State Bar Association gets out a special *Local Association Bulletin* to coördinate the activities of the local associations with those of the state association.

3. *Meetings.* The bar journal reaches every member, and for many of them there is no other contact. For those who can and will attend, however, the bar meeting is a better means of contact.

A. *Annual meeting.* Every bar association has an annual meeting for election of officers and the usual round, familiar to all, of entertainment, festivities, frivolity, sightseeing and speeches. All these are important, but need not be dwelt upon here.

B. *Mid-year meeting.* An enthusiastic Kansas Bar conventioneer remarked in Topeka a few years ago "Why waste time at a convention sitting in an auditorium listening to speeches? We'll read 'em when they come out in the bar journal!" A mid-year meeting with a minimum of festivities and even without speeches has been found useful by

Hammond Times

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several state bar associations. The Missouri Bar calls it a mid-year meeting of committee members, and plans to have every state bar committee get together at that time. Hundreds of Missouri lawyers attended the 1949 mid-year meeting in spite of bitter weather and almost impassable roads, and they all came at their own expense.

C. *Committee meetings.* Important committees may have to meet more than once or may have to meet at a special time so that attendance may actually work a hardship on committee members. Since its recent increase in dues, the State Bar of Michigan has established the policy of paying the expenses to state bar committee meetings of any member who requests it. Many do not request it, and in most instances it is a matter of pride not to, but there are legitimate occasions for resorting to it and the existence of this policy deprives Michigan lawyers of one well-worn excuse for declining committee appointments or failing to share in their work.

D. *Monthly and weekly meetings.* These are, of course, luncheon or dinner meetings on the local level. The greatest obstacle to carrying them on is the problem of providing an interesting and profitable program so frequently. Money to import outside speakers for them is almost never available, and local talent runs out. Speakers from outside the profession are not inappropriate for such occasions, however, and sixteen-millimeter motion pictures in infinite variety are available on a rental basis. The American Judicature Society offers wire and tape recordings of prominent speakers, and its February *Journal* lists a dozen or more sixteen-millimeter films on legal subjects that are available from public-film libraries at small cost.

E. *Convention exhibits.* The State Bar of Michigan is one of a few state organizations that provide for exhibit booths at convention meetings. Publishers, manufacturers of office equipment and furniture, and others are glad to have an opportunity to come into contact with lawyers in that way, and it adds much to the interest and usefulness of an annual meeting.

Section Organization Multiplies Effectiveness

4. *Section organization.* All bar associations have committees, but the Illinois State Bar Association, the Oklahoma Bar Association and several others have worked out a section organization on approximately the same basis as that of the American Bar Association. The Association of the Bar of the City of New York and a few other metropolitan associations have done the same thing. The principle underlying section organization is that a circus can get so big that the show cannot all be contained in one ring, and a three-ring circus is simply a circus with section organization. Each section is a miniature association specializing in some particular topic, and the plan enables an association to multiply its activities and effectiveness many times, and it encourages attendance at meetings by giving each member the opportunity to listen to and participate in whatever is of particular interest to him. Section organization has not spread as widely as it should and there are many more associations, both state and local, that could use it to advantage.

5. *Dues.* Bar association dues range from annual assessments in three digits for large city associations that maintain expensive libraries and headquarters to the four dollars a year now being collected by the State Bar of Texas. The large ones are greatly in the minority and there are no state associations that can be so classified. Texas is now working for an increase to eight dollars, but a recent article in the *Texas Bar Journal* indicated that other professions and occupations in that state pay association and license fees of many times that amount. The more income a bar association has, the more services it can render, and the things a bar association does for its members are things they cannot do for themselves or can do only at much greater expense. Hence, substantial dues are an excellent investment for lawyers and average state bar dues of $25 instead of $5 would make a world of difference both to the profession and to the public it serves. Hardships in dues increases can be and usually are mitigated by means of a lower rate for younger members of the Bar.

6. *Executive secretary.* No bar association can pretend to do a businesslike job and rely entirely upon volunteer or part-time help. Adequate bar finances will permit employment of a full-time executive secretary to take charge of the entire program of activities and see that it is carried out. Usually this job is filled by a young lawyer, but metropolitan bar associations of several cities have had excellent success with young women who are not lawyers but are trained and skilled in the mechanics of association operation. Experience in any association office is valuable for this purpose and is

probably more valuable than legal training.

7. *Bar foundation.* Every bar association should have a foundation as an adjunct to its financial program. The Iowa State Bar Association was one of the pioneers in this field and its foundation has long since passed its original $50,000 goal. Last year's public opinion survey of Iowa lawyers, courts and laws was financed by the Iowa State Bar Foundation. Gifts to bar foundations are deductible on federal income tax returns, and this is a good reason for providing an avenue for donations to the bar association with that important advantage.

8. *Canons of ethics.* Most state bar associations have adopted canons of professional ethics, and some of them canons of judicial ethics, but there are many blanks in both lists, and there ought to be none. In adopting state canons, lawyers should resist the temptation to tamper with the text of the American Bar Association canons. The latter represent the thinking of the best minds of the profession on these important professional problems and there is great advantage in having substantial uniformity between the state and the American Bar Association canons; otherwise instances are bound to arise when conduct will be improper and subject to discipline under the one code but not under the other.

9. *Award of Merit competition.* Bar associations that are doing a good job have much to gain from entering the competition for the American Bar Association Award of Merit. They will be stimulated to do a better job if they know they are in the competition; they will be more alert to take note of and profit by the accomplishments of their rivals; they will share their own achievements with others that are interested; and they will benefit from the national publicity that will be accorded them. The latter is true whether or not they win the award, for all applications are kept on permanent file and the good ones are sent out to other associations that contemplate filing an entry for their inspiration and guidance.

10. *Coördination.* There was once a time when each bar association moved in isolated splendor, scarcely aware of the existence or activities of its neighbors. A quarter-century ago, the Conference of Bar Association Delegates, forerunner of the present American Bar Association House of Delegates, afforded the first large-scale opportunity for interchange of information and ideas among bar associations. The great progress they have made since then can be traced as much to that development as to anything else, and the closer and more effectual the communion and coöperation between bar associations, the greater will be their future progress and accomplishments. President Gallagher is devoting the major emphasis of this year's American Bar Association administration to the furtherance of that objective. That local-state American Bar Association coördination program has been and will be fully developed and presented elsewhere, but this paper would not be complete without a word regarding it in connection with the Bar's activities in its own behalf. At a minimum, it should provide for parallel committee organization as far as possible on the three levels, with overlapping personnel and integrated objectives and activities, to the end that all bar associations may increase their effectiveness by joining forces in a great nation-wide assault upon the problems of the legal profession.

Second Phase of Bar Work Is Service to Members

1. *Educational*

A. *Post-admission legal education.* The legal profession has lagged far behind other professions in this important activity, but since the war we have been catching up fast. Legal institutes are being conducted by law schools and law centers, but bar associations are more and more responsible for most of them. Most convention programs now feature an institute, and certain state associations, such as the Oklahoma Bar Association, have a systematic program of regional institutes in all parts of the state at regular intervals throughout the year. This work is being promoted by the Committee on Continuing Legal Education of the American Law Institute collaborating with the American Bar Association and requires no further mention here except the suggestion that there probably is no state or local bar association, including even the very small ones, that would not profit by some form of continuing legal education as a part of its permanent program of activities.

B. *Law library.* The magnificent library of the Association of the Bar of the City of New York is the outstanding example, but there are many others of all sizes, some in very small towns. Library expenses are a large item in any lawyer's budget, and many partnerships are based on that fact alone. The library advantages gained by two or three lawyers pooling their resources may be multiplied when those of an entire bar association do so, and no more practical or beneficial service than this ever can be rendered to its members by a bar association.

C. *Essay contests and lectureships.* The widow of the late Charles Travers Grant, an Akron attorney, established a fund of $5,000 in his honor "for the purpose of encouraging legal research and study". The Akron Bar Association has used this fund to establish the Charles Travers Grant Memorial Essay Contest, with an award of $125. Each year for the past eight years the same Association has awarded three prizes of $50 each to the authors of the three best outlines of proposed lectures on chosen legal topics. The winners present their completed lectures at luncheon meetings of the Association.

D. *Law office management.* New and better ways of conducting the business of a law office constantly are being discovered. A bar association office could be a clearing house for interchange of such ideas and could promote efficient law office manage-

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First Announcement of Program:

Annual Meeting of the American Bar Association

■ This is the first official program of the 1950 Annual Meeting of the Association and the Canadian Bar Association which will be held at Washington, D. C., from September 18 to September 22. Further details of the program, which are not available at this time, will be published in the August issue of the *Journal*.

THE ASSEMBLY

First Session

Joint Session with the Canadian Bar Association

Constitution Hall

Monday, September 18, 10:00 A.M.

Call to order by the President of the American Bar Association
Address of Welcome
Responses on behalf of The Canadian Bar Association and the American Bar Association
Introduction of Distinguished Guests
Annual Address of the President of the American Bar Association
Annual Address of the President of The Canadian Bar Association
Memorial to Frederick H. Stinchfield, Louis E. Wyman, New Hampshire
Presentation of Resolutions (Constitution, Article IV, Section 2)
Ninth Annual Meeting of the American Bar Association Endowment, Jacob M. Lashly, Missouri, President
Presentation of Awards of Merit to two state bar associations and two local bar associations
Statement concerning the work of the American Law Institute, Harrison Tweed, New York, President
Announcement of vacancies, if any, in the offices of State and Assembly Delegates
Nomination and election of Assembly Delegates to fill vacancies
Nomination of Five Assembly Delegates for three-year terms ending with the adjournment of 1953 Annual Meeting

Second Session

Joint Session with the Canadian Bar Association

Constitution Hall

Monday, September 18, 8:00 P.M.

Speakers to be announced later

10:00 P.M.

The Mayflower

Reception and dance

Third Session

Lisner Auditorium

Wednesday, September 20, 2:00 P.M.

Report of Committee on Resolutions
Speakers to be announced later
Consideration of Amendments to the Constitution and By-Laws

Fourth Session

Lisner Auditorium

Thursday, September 21, 2:00 P.M.

Announcement of election of Assembly Delegates
Presentation of Ross Bequest Award to Norman C. Melvin, Jr., of Maryland
Presentation of Awards of Merit to cities showing greatest improvement in Traffic Courts
Speakers to be announced later

7:30 P.M.

The Annual Dinner

Presentation of American Bar Association Medal
Response by recipient
Speakers to be announced later

Sixth Session

Hotel Statler

Friday, September 22

Immediately following adjournment of the final session of the House of Delegates

Report by the Chairman of the House of Delegates of the action upon resolutions previously adopted by the Assembly
Action by the Assembly upon any resolution previously adopted by the Assembly but disapproved or modified by the House
Unfinished business
New business

Presentation of new officers and members of the Board
Adjournment sine die

HOUSE OF DELEGATES

Hotel Statler

The House of Delegates will meet promptly at 2:30 P.M., Monday, September 18; 9:30 A.M., Wednesday, September 20; 9:30 A.M., Thursday, September 21; and 9:30 A.M., Friday, September 22, for the consideration of reports and recommendations of Sections and Committees, and other business which may come before it.

The Calendar of the sessions of the House of Delegates will be printed in the Final Program for the Annual Meeting, and a final calendar containing the text of all available resolutions to come to the attention of the House will be distributed at the first session.

SCHEDULE OF SECTION MEETINGS

Administrative Law

The Mayflower

Monday, September 18, 2:00 P.M.
Council Meeting
Tuesday, September 19, 10:00 A.M.
General Session
12:30 P.M.
Luncheon
2:30 P.M.
General Session

Bar Activities

Hotel Statler

Sunday, September 17, 9:00 A.M.
Meeting of the Committee on Award of Merit
12:30 P.M.
Luncheon
Conference of Bar Secretaries
2:30 P.M.
Annual Conference of Bar Secretaries
Tuesday, September 19, 10:00 A.M.
General Session
12:30 P.M.
Joint Luncheon with the Conference of Bar Association Presidents
3:00 P.M.
General Session

Corporation, Banking and Business Law

Sunday, September 17, 10:00 A.M. and 2:00 P.M.
The Willard
Council Meetings
5:00 P.M.
The Metropolitan Club
Reception
Monday, September 18, 2:00 P.M.
The Willard
General Session
Tuesday, September 19, 10:00 A.M.
General Session
12:30 P.M.
Hotel Statler
Joint Luncheon with the Section of Taxation
2:30 P.M.
The Willard
General Session
Wednesday, September 20, 10:00 A.M.
General Session
10:00 A.M.
Federal Security Agency Auditorium
Meeting of the Division of Food, Drug and Cosmetic Law
12:30 P.M.
Hotel Washington
Luncheon of the Division of Food, Drug and Cosmetic Law
Thursday, September 21, 10:00 A.M.
Federal Security Agency Auditorium
Meeting of the Division of Food, Drug and Cosmetic Law

Criminal Law

Tuesday, September 19, 10:00 A.M.
Department of Justice Auditorium
General Session
2:00 P.M.
United States Court of Appeals Building
Joint Session with the Section of Judicial Administration
Wednesday, September 20, 10:00 A.M.
Department of Justice Auditorium
General Session

Insurance Law

Sunday, September 17, 12:00 M.
The Willard
Luncheon Meeting of the Officers, Members of Council and Committee Chairmen
Monday, September 18, 2:00 P.M.
Department of Commerce Auditorium
General Session
Tuesday, September 19, 8:30 A.M.
The Willard
Breakfast for Committee on Life Insurance Law
10:00 A.M.
Round Tables I, II, III, and IV
2:00 P.M.
Round Tables V, VI, VII and VIII
6:30 P.M.
The Mayflower
Reception
7:30 P.M.
Annual Dinner
Wednesday, September 20, 10:00 A.M.
Department of Commerce Auditorium
General Session

International and Comparative Law

Sunday, September 17, 2:00 P.M.
The Mayflower
Council Meeting
Monday, September 18, 2:00 P.M.
Department of State Auditorium
General Session
Tuesday, September 19, 8:00 A.M.
The Mayflower
Breakfast
10:00 A.M.
Department of State Auditorium
General Session
12:30 P.M.
Hotel Washington
Joint Luncheon with the Junior Bar Conference
2:00 P.M.
Department of State Auditorium
General Session

Judicial Administration

Sunday, September 17, 10:00 A.M. and 2:00 P.M.
United States Court of Appeals Building
Council Meetings
Monday, September 18, 2:00 P.M.
Joint Session with the Conference of Chief Justices
Tuesday, September 19, 10:00 A.M.
Joint Session with the Conference of Chief Justices
2:00 P.M.
Joint Session with the Section of Criminal Law
7:30 P.M.
Hotel Statler
Dinner in honor of the federal and state judiciary, jointly with the Conference of Chief Justices and the Conference of Bar Association Presidents
Wednesday, September 20, 10:00 A.M.
United States Court of Appeals Building
The Pre-Trial Conference. Joint meeting with the Conference of Judicial Councils and the Section of Bar Activities, to demonstrate a model local institute
Thursday, September 21, 10:00 A.M.
Model Traffic Court

Junior Bar Conference

Hotel Washington
Friday, September 15, 10:00 A.M. and 2:00 P.M.
Council Meetings
10:00 A.M. and 2:00 P.M.
Meetings of Committee of Judges of Awards of Merit
Sunday, September 17, 9:00 A.M.
Breakfast meeting of Delegates from Junior Bar Groups affiliated with the Junior Bar Conference
12:30 P.M.
Luncheon
2:00 P.M.
General Session
5:00 P.M.
Reception
Monday, September 18, 2:00 P.M.
Meeting of Resolutions Committee
Meeting of Nominating Committee
4:00 P.M.
Debate sponsored by Conference on Personal Finance Law, participated in by Junior Bar Conference
Tuesday, September 19, 10:00 A.M.
General Session
12:30 P.M.
Joint Luncheon with the Section of International and Comparative Law
12:00 M. to 2:00 P.M.
Balloting
2:00 P.M.
Meeting of Resolutions Committee
3:00 P.M.
Meeting of New Council
7:30 P.M.
Wardman Park Hotel
Dinner Dance
(Also see program of the American Law Student Association page 553)

Labor Relations Law

Tuesday, September 19, 10:00 A.M. and 2:00 P.M.
Department of Commerce Auditorium
General Sessions

Legal Education and Admissions to the Bar
jointly with the
National Conference of Bar Examiners

Sunday, September 17, 10:00 A.M. and 2:00 P.M.
The Mayflower
Meeting of Council of Section
Monday, September 18, 2:00 P.M.
Hotel Statler
Meeting of National Conference of Bar Examiners
Tuesday, September 19, 10:00 A.M. and 2:00 P.M.
George Washington University
General Sessions of Section and Conference
Wednesday, September 20, 10:00 A.M.
Meeting of National Conference of Bar Examiners

Mineral Law

Hotel Statler
Monday, September 18, 2:00 P.M.
Council Meeting
Tuesday, September 19, 10:00 A.M. and 2:00 P.M.
General Sessions
7:30 P.M.
Dinner
Wednesday, September 20, 10:00 A.M.
General Session

Municipal Law

Hotel Statler
Saturday, September 16, 10:00 A.M. and 2:00 P.M.
Joint Committee Meeting of the Section of Municipal Law and the American Society of Civil Engineers
Sunday, September 17, 10:00 A.M. and 2:00 P.M.

Joint Committee Meeting of the Section of Municipal Law and the American Society of Civil Engineers
Monday, September 18, 2:00 P.M.
General Session
Tuesday, September 19, 10:00 A.M. and 2:00 P.M.
General Sessions

Patent, Trade-Mark and Copyright Law

The Shoreham
Saturday, September 16, 2:00 P.M.
Council Meeting
Sunday, September 17, 10:00 A.M. and 2:00 P.M.
General Sessions
Monday, September 18, 2:00 P.M.
General Session
Tuesday, September 19, 10:00 A.M.
General Session
12:30 P.M.
Luncheon of International Association for the Protection of Industrial Property
2:00 P.M.
General Session
7:30 P.M.
Annual Dinner

Public Utility Law

Sunday, September 17, 2:00 P.M.
The Carlton
Meeting of the Advisory Committee
4:00 P.M.
Council Meeting
Monday, September 18, 2:00 P.M.
General Session
Tuesday, September 19, 10:00 A.M. and 2:00 P.M.
General Sessions
7:30 P.M.
The Shoreham
Dinner Dance

Real Property, Probate and Trust Law

Monday, September 18, 12:30 P.M.
The Willard
Luncheon for Officers and Members of the Council
2:00 P.M.
General Services Administration Auditorium
General Session
Tuesday, September 19, 8:00 A.M.
The Willard
Breakfast Meeting for Officers, members of the Council and members of the Committees
10:00 A.M. and 2:00 P.M.
General Services Administration Auditorium
General Sessions
5:00 P.M.
Meeting of newly elected Officers and Council members
7:30 P.M.
Collingwood Restaurant
Alexandria, Virginia
Annual Dinner

Taxation

Thursday, September 14, 10:00 A.M. and 2:00 P.M.
Hotel Statler
Council Meetings
Friday, September 15, 10:00 A.M.
Meeting of Council Members and Committee Chairmen
12:30 P.M.
Luncheon
2:00 P.M.
Meeting of Council Members and Committee Chairmen
Saturday, September 16, 9:30 A.M.
United States Chamber of Commerce
General Session
12:30 P.M.
Hotel Statler
Luncheon
2:00 P.M.
United States Chamber of Commerce
General Session
Sunday, September 17, 10:00 A.M. and 2:00 P.M.
United States Chamber of Commerce
General Sessions
Monday, September 18, 12:30 P.M.
Hotel Statler
Luncheon
2:00 P.M.
United States Chamber of Commerce
General Session
Tuesday, September 19, 9:30 A.M.
United States Chamber of Commerce
General Session
Meeting of Committee on State and Local Taxes
12:30 P.M.
Hotel Statler
Joint Luncheon with the Section of Corporation, Banking and Business Law
2:00 P.M.
United States Chamber of Commerce
General Session
Meeting of Committee on State and Local Taxes
Wednesday, September 20, 9:30 A.M.
United States Chamber of Commerce
Meeting of Committee on State and Local Taxes

COMMITTEES AND OTHER ORGANIZATIONS

American Citizenship

Hotel Statler
Wednesday, September 20, 10:00 A.M.
Meeting

American Law Student Association

Hotel Washington
Saturday, September 16, 4:00 to 6:00 P.M.
Special Pre-Conference Meeting

Sunday, September 17, 10:00 A.M.
First Plenary Session
2:00 to 4:00 P.M.
Panel Discussions
Monday, September 18, 12:30 P.M.
Luncheon
2:30 P.M.
Second Plenary Session
4:00 to 5:00 P.M.
Meeting of the Nominations Committee and the Credentials Committee
7:00 P.M.
Panel Discussions
Tuesday, September 19, 9:00 A.M.
Third Plenary Session
2:00 to 4:00 P.M.
Meeting of New Board of Governors
Committee Meetings with new and retiring members
(See also the program of the Junior Bar Conference, page 552)

AMERICAN JUDICATURE SOCIETY
Hotel Statler
Wednesday, September 20, 12:30 P.M.
Luncheon

INSTITUTE SPONSORED BY THE COMMITTEE ON CONTINUING LEGAL EDUCATION OF THE AMERICAN LAW INSTITUTE IN COLLABORATION WITH THE AMERICAN BAR ASSOCIATION
Hotel Statler
Saturday, September 16, 10:00 A.M. and 2:00 P.M.
12:30
Luncheon

CONFERENCE OF BAR ASSOCIATION PRESIDENTS
The Mayflower
Saturday, September 16
10:00 A.M.
Meeting
12:30 P.M.
Luncheon
2:00 P.M.
Meeting
Sunday, September 17, 2:00 P.M.
Meeting

CONFERENCE ON PERSONAL FINANCE LAW
Hotel Washington
Monday, September 18, 4:00 P.M.

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS
Hotel Statler
Monday, September 11 to Saturday, September 16

Proposed Amendments to Constitution and By-Laws of the American Bar Association

To be presented to and acted upon at its Seventy-Third Annual Meeting at Washington, D.C., September 18-22, 1950

■ TO THE MEMBERS OF THE AMERICAN BAR ASSOCIATION AND OF THE HOUSE OF DELEGATES:

Notice is hereby given that W. J. Jameson, of Billings, Montana, Howard L. Barkdull, of Cleveland, Ohio, Robert R. Milam, of Jacksonville, Florida, Franklin E. Parker, Jr., of New York, New York, and James L. Shepherd, Jr., of Houston, Texas, members of the Association and members of the Committee on Scope and Correlation of Work, have filed with the Secretary of the Association the following amendments to the Constitution and By-Laws of the Association:

I.

(1) Amend Article X, Section 6 of the By-Laws by adding a new line after line 10, Customs Law, to read:

Employment and Social Security

(2) Amend Article X, Section 7, of the By-Laws, by adding a new subsection (i) as follows:

(i) *Committee on Employment and Social Security.* This committee shall study the existing and proposed laws and regulations concerning employment and social security, including old age payments, unemployment compensation, health insurance, pension plans and related matters.

Reletter the following subsections to run consecutively.

II.

Amend present Article VIII, Section 4 of the Constitution, by inserting in the title, line 1, before the words "Executive Secretary", The words "Director of Activities"; inserting in line 3 before the words "an Executive Secretary", the words "a Director of Activities"; and inserting in line 6 after the period a new sentence, "The Director of Activities shall be a member of the Association", so that present Article VIII, Section 4 will read as follows:

SECTION 4. *Director of Activities, Executive Secretary, Assistant Secretaries, Assistant Treasurers.* The Board of Governors may elect, and may prescribe the duties of, a Director of Activities, an Executive Secretary, one or more Assistant Secretaries and one or more Assistant Treasurers, each of whom shall hold office at the pleasure of the Board of Governors. The Director of Activities shall be a member of the Association. The Executive Secretary and other employees need not be members of the Association.

JOSEPH D. STECHER
Secretary

THE PRESIDENT'S PAGE

HAROLD J. GALLAGHER

Board of Governors Authorizes Appointment of Director of Activities

▪ The Board of Governors at its May meeting in Washington, acting on the recommendation of the President and of the Committees on Scope and Correlation, Coordination of Bar Activities, and Public Relations, authorized the employment of a Director of Activities to serve under the President and the Board of Governors.

The Director will act as an assistant to the President and, in coöperation with the Chairmen of the Committees on Coordination of Bar Activities, Public Relations, Regional Meetings, American Citizenship, Legal Aid, and Lawyers Reference Plan and the Section of Judicial Administration, will assist them in carrying out their respective programs. He will also perform such other duties as may be assigned to him by the President and the Board of Governors.

This is a great forward step and a necessary one. The work of the Association has grown so much that it is impossible for any one person to be responsible for all the tasks of administrative detail involved. To correlate the programs of the various sections and committees of the American Bar Association; to bring about the proper coördination of the work of the American Bar Association with the state and local associations, facilitating the interexchange of information, to handle the public relations program, the regional meetings, the American Citizenship program, Legal Aid, Lawyer Reference Service Plans and the vitally important program of the Section of Judicial Administration requires the full-time work of someone besides the President and volunteers.

The Association has been extremely fortunate in having had for so many years the very competent services of Mrs. Olive G. Ricker as the Executive Secretary in the performance of the formidable task of administering the work of the headquarters office in Chicago and many other activities. The appointment of a Director of Activities will not involve a change in the administration of the headquarters office or in the other work that has been and will continue to be so efficiently carried on by Mrs. Ricker.

It is imperative that we obtain the services of the most competent lawyer who can be found to undertake the important work of Director of Activities. It represents, in my opinion, a great challenge to anyone who is interested in bar association work. It is an opportunity to render a great public service by taking a prominent part in creating an organization better designed to serve the profession as a whole and encouraging, in a spirit of public service and through a common effort, the state and local bar associations in the several states to become united in the bonds of common sympathy, purpose and understanding in order to achieve the necessary objectives of the legal profession.

Program of Regional Meetings To Be Revived

In the May Issue of the JOURNAL I referred to the importance of the American Bar Association's holding Regional Meetings throughout the country to stimulate interest in bar activities and to bring the Association itself nearer to its members who are unable to attend the Annual Meetings. The committee appointed by me in February, with the authority of the Board of Governors, to study the advisability of renewing the program for regional meetings made its report to the Board at its May meeting. It has recommended that Regional Meetings be held each year in addition to the Annual Meeting. It is proposed that the country be divided into ten districts and that a Regional Meeting be held in some city in each of the ten districts every two years. The purpose will be to hold Regional Meetings, with the coöperation of the state and local bar associations, that offer an outstanding program comparable to the programs of the Annual Meetings of the American Bar Association. It is believed that the attendance at such meetings will be large.

The committee, with a special subcommittee of the Board of Governors, will plan these Regional Meetings for the next Association year and will make a report to the meeting of the Board of Governors to be held in Washington next September. I am sure that these Regional Meetings will greatly stimulate interest in bar activities generally and in the work of the American Bar Association in particular.

Program of Coördination Proceeds Successfully

The work of coördinating the efforts of the American Bar Association with the state and local associations has been proceeding in a very satisfactory manner.

Each state bar association has been requested to designate for each committee that is established in its own association a liaison representative

for the parallel committee or Section of the American Bar Association. This will permit the ready exchange of information and committee reports between the committees of the state bar associations and the American Bar Association engaged in like matters. In more than half the states these representatives have already been appointed.

It is hoped that each state bar association will recognize the need for coördinating the activities of the local associations in its state with those of the state association so that in time the activities of the American Bar Association may, through the state associations, be closely tied in with such local associations. When this need is realized, it should be possible to have liaison representatives appointed by each local bar association. Then material prepared by both the local and state associations and the American Bar Association may be placed readily in the hands of all bar associations for their information or for their advice or action with respect to the problems being dealt with on a local, state and national level. The presidents of a number of the state bar associations have told me that they are calling meetings of all local bar association presidents to be held in connection with their annual meetings. A conference of local bar presidents in each state modeled after the National Conference of Bar Presidents would be a most constructive step.

As lawyers we fully appreciate the necessity of enlisting the support of the lawyers in every community, large and small, in the work and objectives of the organized Bar. All the lawyers in every community should realize their own personal responsibility in the work of the profession. One of the primary attributes distinguishing the lawyer from most other professions is his dedication to the public service. There are so many matters with which the profession is concerned for its own advancement and the public good that the aid and the serious work and coöperation of every lawyer in every state and local bar association is needed. Every lawyer should understand that he himself is vitally important in the work of the organized Bar and that he may not shift his responsibility to others. Only by the combined efforts of all of us can we bring to bear the full strength of our profession upon the great questions of the day. No lawyer in any community should have reason to feel that he has less opportunity than others to contribute to the profession no matter how active or prominent others may be in the work of their local, state or national associations.

We must get our program in all its aspects down to the grass roots so that we may receive aid from, as well as give aid to, the local associations. It is the support of such lawyers that will spell success or failure in the end for any real program that may be instituted.

As I have said in previous issues of the JOURNAL, the establishment of lawyers' reference plans and legal aid societies in every community of the nation is a more important part of the lawyers' obligation to society than ever before.

I am pleased to say that the lawyers' reference plans are being established in many communities. I urge all bar associations, large and small, that have not already looked into this plan to do so without delay. I hope that a place on the program at the annual meeting of every state bar association will be given to consideration of the appointment of a Committee on the Lawyers Reference Plan if such a Committee does not now exist. William M. Wherry, 30 Broad Street, New York 4, New York, Chairman of the Special Committee on Lawyers' Reference Service, will be able to supply any desired information.

Administrative Law Section To Publish Handbook

At its May meeting the Board of Governors authorized the publication by the Section of Administrative Law of a handbook on the basic materials underlying administrative law that I requested the Section to prepare. Most of these materials are out of print and they always were difficult to obtain. The book will be designed for practical use. Copies are expected to be available before September 1 at cost of printing, probably $2 each. All those who are interested in obtaining a copy of this book should write to Ashley Sellers, Chairman of the Section of Administrative Law, 1302 Eighteenth Street, N.W., Washington 6, D. C., to reserve one. I am sure the profession will be much indebted to the Section of Administrative Law for its valuable contribution to the literature on this important subject.

Increase in Dues Should Be Considered

Our immediate past president, Frank E. Holman, in his Annual Report delivered at the 1949 Annual Meeting at St. Louis, stated:

> I know the matter of membership dues is a "touchy" subject and that there are those who believe that the raising of dues tends to reduce the number of our members and in the end does not produce more income. . . . Certainly if the Association is to perform the services which it is performing, it must have some income. As our income now stands, we cannot expect to go forward with projects that are absolutely essential for the conduct of our affairs, the well being of our Association, and a proper performance of our public duty. . . . I make so bold as to suggest that our annual dues for senior members should be raised to $25 and our dues for junior members to $10 per year. In my opinion, we cannot continue to perform services already undertaken on the present level of dues. We are actually losing money through the present experiment of the $3 initial dues for junior membership. . . . Even from the $3 memberships $2.50 of each $3 received is allocated to the *Journal*, leaving only $.50 to the Association which hardly covers the cost of processing a membership.

I have heard much discussion during my travels throughout the country during the past year as to the work of the Association and the matter of dues. Suggestions have been made that the dues should be somewhat increased, not many suggesting that the raise be as high as $25 for senior members or $10 for junior members, as Mr. Holman proposed.

Many of those who have spoken to me have stated that in their own bar associations, both local and state, an increase in dues, permitting the association to enlarge the services rendered to members, has resulted in a large increase in membership and stimulated greater interest in the association work.

My own experience has convinced me that there is so much for us to do for the improvement of the administration of justice and to carry forward the objectives and service of the Association that our members would be amply repaid by the results obtained if sufficient additional income were available to the Association.

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The following invitations have been accepted for the month of July:

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July 4—Radio address, "Our Basic Freedoms", NBC.

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American Law Institute

(Continued from page 545)

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Referring to the Commercial Code, Judge Goodrich said that if it "represents anything new in the law it must necessarily conflict with some of that which is old. The new never did displace the old in the history of man without a struggle. If we compromise all our differences our Code's contribution will be lessened. . . . There is no reason to think we ever could reach finality on the form of the statement. But there is reason to hope and expect that we can state our ideas in language which is reasonably well understood. We think we have been pretty successful so far."

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Four changes in the Institute's Model Act were recommended by Mr. Ellingston on the basis of experience in the states which have adopted it. Instead of covering offenders between the ages of 16 and 21, he urged that the Act apply to all committed offenders under the age of 21. He also urged restoration of the power of judges to grant probation, the transfer of existing correctional institutions to the Youth Authority established by the Act, and the expansion of the functions of the Youth Authority so that it would become the state's general headquarters in the fight against delinquency. It would thus become the responsibility of the Authority to aid all communities in improvement of law enforcement.

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AMERICAN BAR ASSOCIATION
Journal

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LOUISE CHILD, *Assistant to Editor-in-Chief*.....Chicago, Ill.

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EDITORIAL OFFICE

1140 North Dearborn Street.....Chicago 10, Ill.

■ *The Bear in Sheep's Clothing*

It is not at all unusual for a Supreme Court decision to make headlines. High Court opinions often receive editorial comment, favorable and unfavorable. It is *news*, however, when a single Justice's opinion is accorded the honor of being reprinted almost in its entirety in the *New York Times Magazine* as an outstanding contribution to American public opinion. Mr. Justice Jackson's concurring and dissenting opinion in *American Communications Association, C.I.O.* v. *Douds* (May 8, 1950) was accorded this distinction, and for this reason merits careful reading by American lawyers.

The *Douds* case deals with the constitutionality of the so-called "Anti-Communist oath" prescribed by the Taft-Hartley Act. Justice Jackson concurred with the Court majority in holding that Congress could reasonably require union officers to forswear membership in the Communist Party. His experiences with the Russians at the Nuremberg Trials qualify him as a judge of Communism. He makes these points about the Communist Party which differentiates it from all other political parties in America:

1. The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate.

2. The Communist Party, alone among American parties past or present, is dominated and controlled by a foreign government.

3. Violent and undemocratic means are the calculated and indispensable methods to attain the Communist Party's goal.

4. The Communist Party has sought to gain this leverage and hold on the American population by acquiring control of the labor movement.

5. Every member of the Communist Party is an agent to execute the Communist program.

Justice Jackson earlier warned in the *Terminiello* case that the German propagandist, Goebbels, had gloated that the Nazis "declared openly that we used democratic methods only in order to gain the power and that, after assuming the power, we would deny to our adversaries without any consideration the means which were granted to us in the times of [our] opposition".

Do Americans need any further warnings on the point?

Justice Jackson dissents, however, from the view that Congress can constitutionally require a union officer to swear that "he does not believe in . . . the overthrow of the United States Government by force or by any illegal or unconstitutional methods". Freedom of speech and freedom of belief are fundamental in a democracy. The thought of man shall not be tried. We must protect freedom for the thought we hate up to the point where it involves a present danger of a hostile overt act against our Government. Anything less than that is that tyranny over the mind of man which Jefferson, Paine, and Patrick Henry so abhorred.

Justice Jackson's opinion is a timely warning against national complacency concerning Communism on the one hand and an over-zealous invasion of true civil liberties on the other.

■ *A Great Opportunity*

The work of the American Bar Association has become big business. The program of public relations on which it has embarked, the coördination of its activities with those of state and local bar associations, to mention only two of its enterprises, cry out for the full-time services of a number-one man. It has become a commonplace for the president of the Association to abandon his practice for the year of his term; yet that is not enough. Even with single-minded devotion, he hardly learns his job before he must relinquish it. For years the Association has expected too much of its Executive Secretary and has received from her more than it had a right to expect. She has not only done a superb job as captain of the administrative staff but has from time to time with great skill done what would be expected of a full-time director of activities.

The Board of Governors has resolved to fill this breach permanently. The means that they have chosen is the appointment of a Director of Activities. The announcement is to be found in The President's Page at page 555 of this issue.

To find a man who will measure up to the requirements will not be an easy task. The position with its unique prestige will undoubtedly command the best material at the Bar but it will be hard to fill even with the best material.

The man who holds the job will be like the career head of a government department who sees cabinet members come and cabinet members go but who remains the repository of the policy and tradition of the organization. He will have the responsibility of interpreting, year in and year out, the legal profession to the public. No one who has felt the ecstasy—spiritual, emotional and intellectual—of working at the "great interest of man on earth" in brotherhood with the nobility of the profession can help but feel the almost irresistible attraction of the place. Most too will have misgivings about their ability to fill it. May an all wise Providence lead us to a happy choice.

Editorial From a Member of Our ADVISORY BOARD

■ *The Present Situation in International Law*

The Forty-Fourth Annual Meeting of the American Society of International Law should not pass without notice in this JOURNAL, devoted as it is to the rôle of the lawyers of the United States. This is not merely because of the discussions that took place touching upon important current problems, such as the Doctrine of Recognition of Governments—a doctrine of such importance in our relations with China—but also other matters such as strengthening the United Nations, which is the organization representing that theoretical community of nations from which international law emanated and to which it owes whatever sanction it has had throughout the last four centuries.

As Judge Manley O. Hudson, President of that Society, has stated, "In the forty-four years of its existence no such challenge has confronted the Society". That such a challenge would naturally arouse interest and a sense of responsibility for the shaping of international law to meet new conditions is not unnatural, but the challenge seems to go even far deeper; it is not to any particular doctrine of international law which, like all law, must be subject to modification and adaptation in this ever-changing world, but to its very existence as a system for adjusting relationships among free nations, since without such nations there can be no international law.

Many lawyers talk of a divorce between law and policy, but it is obvious that in a large sense such a thing is impossible and that the phrase is a mere slogan

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Each month a member of the *Journal*'s Advisory Board is asked to contribute an editorial signed by him. In this way we hope to be able to reflect the many facets of opinion, and the active interests, of lawyers, judges and teachers of law, in all parts of the United States. The views expressed by each contributor are his own, and are not necessarily those of the Advisory Board or the Board of Editors.

which will not stand analysis. International law must be the relationship between independent states; such a relationship posits a political system in the world generally in which the independent existence and legal entity of independent states is recognized and respected. The destruction or vassalage of those states would mean the end of international law which is founded primarily upon the consent of states; *placuit ne gentibus* is the ancient Latin phrase connoting the fundamental idea.

The challenge today is therefore a general challenge to that civilization that has grown up through the creation of interrelationships of independent states since the time of Grotius. As the first President of the American Society of International Law, Elihu Root, said in his opening address forty-four years ago, referring to international law and its importance: "It is impossible that the human mind should be addressed to questions better worth its noblest efforts."

To all of us it must, indeed, be a bitter disappointment that today we should appear to be so much farther from our goal than in those days when our leaders, such as Elihu Root, General Foster, John Bassett Moore, Mr. Olney, a former Secretary of State, and Robert Lansing, who was to become Secretary of State (to mention only a few), felt so much confidence in the coming of a better world in which the rôle of law and reason, rather than that of force, would govern mankind. Important and world-heralded arbitrations had demonstrated the ability of nations to solve controversies by methods of reason and law; war was looked upon as an evil survival of an earlier stage of human development.

This comforting gospel of human progress through the ages gave an importance and prestige to international law that was rudely shattered by the war of 1914 with its discouraging attempts at peace-making. The "war to end war" was nevertheless followed by bright hopes in collective security embodied in the long-desired League of Nations, thus reviving a faith in international law with its new instrument and with its mutiple treaties promising a world code based upon justice.

This renascent faith was once again to be shattered by World War II—that stupendous catastrophe, which after five years has resulted in today's so-called "cold war" with its war-budgets and daily alarming headlines telling of the armament race with ever deadlier weapons, which, if produced in sufficient quantity, could readily exterminate the once proud species of *homo sapiens*.

Not unnaturally, all this has been accompanied by a reign of pessimism which makes it difficult for the most enthusiastic advocates of international law to hold the faith that animated the founders of the American Society of International Law. That pessimism is an influence that we are called upon to combat, for a world without hope can accomplish little of value. International law to survive must depend upon some measure, at least, of good faith and good will among those who govern the nations. If treaties are entered into only as lures for the unwary to be violated when supposed national interests dictate, if language is to be a mere vehicle for deceit and if diplomacy is to be a mere instrument for espionage and threats, there cannot be any international law. Under such circumstances, it ceases to have any foundation; its logic, its methods and its history are all matters for the morgue.

Such a situation cannot become either universal or permanent. Mankind has ever had a belief in law. Whatever its shortcomings may have been, that concept has been manifest from the taboo of primitive man to the comprehensiveness of the digest of Justinian or the Constitution of the United States. Anarchy among the nations is not and never can be a permanent state.

The basic doctrine of communism is war—class war—and as long as that doctrine prevails over a large part of the world it is idle to think of a reign of law throughout the community of nations. International law as a solvent of international difficulties, as a method of retaining peace among the nations is utterly incompatible with chronic war.

International law is no mere code like the Twelve Tables of the Roman Civil Law. It is, in truth, a state of mind, coupled with a body of principles evolved from human experience. This state of mind and body of principles it is more necessary to foster than ever before. It is the function of the lawyers of this land to continue to hold high the standards erected by our Founders and to maintain that struggle for law without which there can be nothing worthy of the name of "civilization".

It is for these reasons that I am convinced that the Bar should, amid the difficult and devastating problems that we must face, insist that only upon a basis of law among the nations can any world community exist, and that the cause of international law is thus a cardinal element in the struggle in which our nation is now taking a leading rôle.

FREDERIC R. COUDERT

New York, New York

"Books for Lawyers"

THE PAPERS OF THOMAS JEFFERSON, *1760-1776. Volume I. Princeton: Princeton University Press. 1950. $10.00. Pages lviii, 679.*

The publication by the Princeton University Press of the initial volume of its projected fifty-two volumes of *The Papers of Thomas Jefferson* is the first fruit of one of the most ambitious projects in the history of American historical scholarship. The inclusion of the 25,000 known letters to Jefferson, less than one-fifteenth of which have been printed before, as well as the 18,000 by him, only a third of which have been printed before, gives some idea of the novelty of much of the work from which the reader will be able to obtain a comprehensive grasp of most of the major problems and movements of Jefferson's time.

The general plan of the editors is to publish about fifty-two volumes of about seven hundred pages each, in two series, the first of about forty volumes being a chronological arrangement of all letters to and from Jefferson, together with many other documents which seem appropriate in the chronology, and the second of about ten volumes dealing with several subjects topically. The last two volumes will contain a general index of the whole work, but, for convenience, temporary cumulative indices will be published from time to time. This is necessary since only about four volumes can be brought out each year and the completion of publication will require more than a decade. Indeed, it is to be hoped that the editors will not be required to maintain so rapid a schedule, since that might make impossible the extensive annotations that so many of the documents merit.

The first volume covers the entire period of Jefferson's active practice as a lawyer, although the bulk of his legal papers are reserved for publication in three volumes of the topical series. The second volume to appear will contain Jefferson's revision (along with Wythe and Pendleton) of the entire body of Virginia statute law (1776-1779), with explanatory notes throwing much new light upon that important work. The first two volumes, therefore, will be of prime interest to lawyers, for Jefferson's career was not like those of men who have turned to literature or politics because they failed at the Bar: Jefferson had a large and successful practice, even though he did not have the readiness on his feet that was enjoyed by some of his rivals at the old General Court of Virginia. He had prepared for the Bar by thoroughly grounding himself in the classics before turning to the English cases and texts, which he had studied with the purpose of pursuing every legal principle to its source, and his briefs and notes show a wide knowledge of the law's old masters. He believed that young men training for the Bar should be given long preparation in reading, free from entanglements in a law office, where, most likely, they would find themselves legal hacks of older lawyers rather than students. He realized, too, that lawyers vary enormously in abilities, and desired to see the appellate court practice reserved for a special class of advocates who, freed from competition from the lesser lights, could take ample time in each case to give the appellate court a broad view of the law. Those selected lawyers would, as he called it, become "philosophers". For Jefferson's views about democracy never blinded him to the need for quality in leadership.

This first volume carries Jefferson through the period of the Declaration of Independence and fairly launches him on a career of political reform that was to affect profoundly the whole current of American life and thought. For Jefferson was utterly unafraid of an idea, and, unlike Henry, who was only a separationist, Jefferson was a thoroughgoing revolutionist even though his feet were always squarely on the ground. Throughout his letters there shines forth that versatile genius, that profound scholarship and that enormous energy that touched and enriched American life, and that in other countries, for that matter, at many points. Moreover, he was not shallow in his versatility, but went deep into each subject that engaged his attention, whether it was architecture, botany, husbandry, law, politics, or one of a score or more of other activities that he pursued; and everything he did had the stamp of thoroughness and finality, whether he was drafting a declaration of independence, creating a new system of coinage, making rules for the Senate or planning a state house. Even his asides stimulate the imagination and offer provocative subjects for debate.

Comprehensive though this volume is, it is almost certain that a number of Jefferson papers of the period covered are still in private hands and unknown to the editors, but no doubt the interest aroused by the initial publication will bring out some of them for publication later in the series. To Dr. Julian P. Boyd, the editor, and his assistants, to the distinguished advisory board headed by Dr. Douglas S. Freeman, to *The New York Times*, which contributed so generously in money, and to Princeton University are due the thanks of all those who are interested in American history and the preservation and strengthening of American institutions.

DAVID J. MAYS
Richmond, Virginia

JOHN L. LEWIS, AN UNAUTHORIZED BIOGRAPHY. *By Saul Alinsky. New York: G. P. Putnam's Sons. 1950. $4.00. Pages xi, 376.*

This brave and interesting *Unauthorized Biography* of one of the leading men of our day is a book that all who wish to understand the times, and especially those who ponder the growth and doings of labor unions, will wish to read.

Mr. Alinsky is a friend of John L. Lewis and an admirer, but not an uncritical one. Although the biography is "unauthorized", it is obvious that the account is according to Mr. Lewis. In this lies its value. This American-born, brooding Welshman, 70 years old last Lincoln's Birthday, was the eldest of the eight children of Thomas Lewis, according to the story a burly miner blacklisted from coal mining for fifteen years for leading a strike when John, his first baby, was two years old.

We have the account of John L. Lewis' restless early days of managing a baseball team and a debating team, devouring sensational books, until he met Dr. Bell's daughter Myrta, a lovely person, cultivated, calm and strong, who organized his reading. We learn that he ran a mill, carpentered, managed a local opera house, and at 21 began five years of wandering and adventure. The story goes that in 1906 he went into the coal mines and the next year began his long, happy and devoted marriage to Myrta Bell. After a short try at local politics he moved to the Montgomery coal fields in Illinois in 1909 and began his career as a union officer. Mr. Alinsky tells that in 1911 Lewis by threats of brute force compelled the American Federation of Labor to grant the miners a charter for an industrial union; Lewis and Samuel Gompers became close friends and Gompers made him an organizer. Then Lewis tried without success to organize steel, rubber, lumber, glass and electricity; he did succeed in organizing a machine of his own within the United Mine Workers, for which he carried the administrative burden beginning in 1919 and of which he became president the next year.

Probably John L. Lewis' historical accomplishment will turn out to be his organizing the Congress of Industrial Organizations, and, through the C.I.O., organizing into industrial unions the workers of the great mass-producing industries, automobile, steel, electrical, rubber, glass and the others.

Mr. Alinsky sheds light apparently from headquarters on the workings of Mr. Lewis' inner spirit. I was one of the Chrysler negotiators at the settling of the sit-down strike of Chrysler employees in 1937 in Governor Murphy's office at Lansing, Michigan. Mr. Alinsky's account of that affair is a far cry from anything that appeared to us who were there at all the meetings. Lewis' feeling about the influence of Chrysler's associates upon Chrysler is something that Mr. Lewis had no means of informing himself about and Mr. Alinsky's account of that influence is all imaginary. It illustrates his readiness to believe tall stories about what goes on in business.

Two incidents that Mr. Alinsky, who was not there, describes in detail as having taken place, illustrate Lewis' imaginative sensitiveness to affronts that did not occur, and also his desire to see those with whom he is dealing on the other side frightened by his force and invective. The author gives a sense of the angry emotions that Mr. Lewis harbors and that, as this tale shows, greatly refract and distort what he sees before him.

There is no doubt that Mr. Lewis is a stout antagonist armed with many gifts, among which, in our experience, are sarcasm, aloofness, cool superiority, contempt and patience. He sat for what seemed to be hours in a corner, face to the wall and back to the rest of us. We did not see any example of his alleged volcanic anger. Once, when we took a step that the Governor and the mediator feared would bring it forth, no lamb could have been milder.

When one considers Lewis' joining with Gompers and his breaking with him, his joining with President Roosevelt and breaking with him in anger, his brilliant founding of the C.I.O. and his departure from it, his parting from Philip Murray in anger and scorn after so many years of friendship and work together, one thinks of the imaginary affronts to him at the time of the Chrysler conference in Lansing. One then wonders how much the same imaginative emotionalism may have done in refracting and distorting whatever led to these other events. Seemingly, the value of this book lies in the glimpses and pictures it gives of what the facts appear to be when reflected by the mirrors of Mr. Lewis' inner workings. In due time there will have to be studies of what the facts actually were.

Meantime, an important question is this: John L. Lewis, contrary to the teaching of Gompers, powerfully helped the Federal Government to establish a constitutional and legal basis for practically unlimited control over labor-management relations and unions. When will that Government exercise its controls to protect the unions as unions, the rank and file of workers, the employers, the Government itself, and all the rest of us, from what happens when again there meet in an interesting and powerful man like Lewis a set of qualities and powers that enable his refracting and distorting emotions and his other long suits and short suits to play so much hob with all of us?

NICHOLAS KELLEY
New York, New York

WORKMEN'S COMPENSATION LAW OF INDIANA. *By Ben F. Small. Indianapolis: The Bobbs-Merrill Company, Inc. 1950. $12.50. Pages xviii, 647.*

The title of this book would indicate that it is restricted to the workmen's compensation law of Indiana. This is far from true. Wherever cases in Indiana settle a point, such cases are quoted. However many of the legal problems involved are common to every state and, aside from administrative details, this book is

of great value to lawyers in any jurisdiction. It follows in the main the form used by the leading nationwide books on workmen's compensation.

Excellently discussed and completely annotated are such subjects as personal injury or death by accident, arising out of the employment, in the course of the employment, together with the subjects of the nature of the remedy, the history and development of the workmen's compensation act, extraterritoriality and conflict of laws, inclusions and exclusions under compensation acts, the employment relation, disability, death benefits, specific defenses, proceedings before the Industrial Accident Board, and occupational diseases.

For practitioners in Indiana there is in the appendices a copy of the Indiana Workmen's Compensation Laws, forms used, etc.

Workmen's compensation has become the largest casualty insurance in the United States. About one billion dollars a year is paid by employers to private insurers, state funds, and for self-insurance. About 7500 lawyers give all or the major part of their time to such practice, about two-thirds of whom are on the insurance side, and one-third represent employees and claimants.

Nearly 2,000,000 workers are injured annually in industry, 18,000 of whom die, 103,000 suffer the loss of an arm, leg, or parts thereof, or of vision.

While the book has been written primarily for the practicing lawyer, insurance carriers, employers, personnel managers and labor representatives will find it useful, and in fact indispensable.

In addition to its excellent content, it is well bound and printed and contains a comprehensive index.

And most important of all, the book is in keeping with the modern trend and treats the compensation act in the manner it was intended to be treated, to wit, with a broad and liberal spirit.

SAMUEL B. HOROVITZ
Boston, Massachusetts

TRIAL OF MADELEINE SMITH *(Third Edition). Edited by F. Tennyson Jesse. William Hodge and Company, Limited. London: 1950. Price 15 shillings. Pages 413.*

This is a real "whodunit", if we ever read one, reporting a famous Edinburgh murder trial of the Victorian period. A brief synopsis of this rather lengthy volume (413 pages of fine print) in modern reporting style would read about as follows:

Madeleine Smith and Pierre Emile l'Angelier were lovers. Madeleine, a girl in her twenties, of a fairly well-to-do family, carried on clandestine relations with L'Angelier for a period of about two years, from April, 1855, to March, 1857. As is usual in such relationships, one of the couple became bored, and in this case it was young Madeleine who decided that the time had come for her to cast off the ardent Frenchman and achieve married respectability with one William Minnoch, evidently a business friend of her stern Victorian father. L'Angelier was not easily to be cast aside and apparently would have been willing to the end to marry Madeleine had her father been willing to accept him as a son-in-law. Nearly the whole of Appendix I, consisting of some eighty-five pages, is given over to correspondence introduced as exhibits in the case, consisting mainly of letters from Madeleine to Emile. To put it mildly, Madeleine Smith overwrote herself in these torrid letters which, in part, perhaps could be said to constitute one of the motives for the murder, if one were actually committed.

To make a long story short, Pierre Emile l'Angelier died of arsenic poisoning. The medical testimony on that point was undisputed. He had three attacks of illness, all showing the same symptoms, beginning February 19, 1857, another February 22, and the third and fatal attack on the twenty-second day of March, 1857. Prior to these attacks Madeleine Smith had purchased arsenic, but none of her purchases were shown to have been prior to the first attack suffered by L'Angelier. She had purchased arsenic on Saturday, February 21, just prior to Emile's second attack, and she made two subsequent purchases of arsenic on March 6 and March 18, 1857, just a few days prior to the last and fatal attack.

The evidence in the case against Madeleine Smith was almost wholly circumstantial. One is amazed at the ease with which poisons were readily sold at this period in Scotland, and we must say that Madeleine was quite open about making these purchases. She made an unsuccessful attempt to buy prussic acid some time about the second week in February, before Emile had his first attack of illness. She told conflicting stories about the purposes for which the arsenic was bought, but it seems to us that from the point of view of the prosecution the complete failure of proof as to the charge of murder was the fact that no meetings with L'Angelier were known to have taken place just prior to the second and third attacks of arsenic poisoning.

There was an interesting question of evidence when the prosecution attempted to introduce a diary kept by the deceased lover, L'Angelier, in which he made notations to the effect that he had seen Madeleine the nights of February 22 and March 22, 1857, just prior to the second and third attacks of arsenic poisoning, and there is no doubt that if these diary entries had been allowed in evidence the chain of circumstantial evidence against Madeleine Smith would have been much stronger. While the diary had all the appearance of being kept with regularity it did not continue beyond March 14, and thus ended prior to the third and fatal attack. We agree with the ruling of the Lord Justice and his associate in ruling out the diary of the decedent although there was a dissenting opinion on the ruling. It seems to us there is good reason for believing that such entries, when used as evidence, would open the dangerous opportunity for persons to keep diaries with the idea of punishing their enemies in the event of intended suicide by fabricating en-

tries to connect such enemies with their subsequent death.

Another weak point in the case for the prosecution, it seems to us, was the fact that Madeleine Smith apparently lived in fear and terror that her Victorian father, who was a respected architect of fair means and station, would find out about her relationship with L'Angelier and that her many indiscreet letters would subsequently be found even if she were able to consummate her intended marriage to William Minnoch. It appears to us that with Emile l'Angelier murdered she still would not have recovered these letters which were bound to have been found among the effects of the decedent. Thus, part of the motive for wishing the death of her former lover was lacking and in the address to the jury for the defense the Dean of Faculty, John Inglis, took considerable advantage of this phase of the evidence.

Looking at the book with the eyes of either a lawyer or a layman we can hardly see how the jury could have found otherwise than "not guilty" as to the first count, dealing with the first attack of poisoning, and "not proven" as to the second and third attacks. Looking at the book solely with the eyes of a lawyer, one can hardly fail to speculate as to what might have been the outcome of the case if Madeleine Smith had been able to take the stand on her own behalf which, strange to say, in that period of Scottish criminal procedure was not permitted. We cannot see that an American lawyer has much to gain by reading about this famous British trial. The book certainly has a fascination for attorneys interested in mystery stories, for it truly proves that fact is stranger than fiction. No one, in our opinion, will now ever solve the mysterious death of Pierre Emile l'Angelier. It could have been suicide, as indicated but not proved by the defense, or it could have been murder through the delicate but cruel ministrations of Madeleine Smith.

In any event, we are inclined to hold with the school of thought expressed by the author in speculating about what happened, "probably she did it, but, anyway, he deserved it".

PEARCE C. RODEY
Albuquerque, New Mexico

THE IDEA OF USURY. *By Benjamin N. Nelson. Princeton: Princeton University Press, 1949. $3.00. Pages xx, 257.*

Neither American Jurisprudence nor *Corpus Juris Secundum* under the title "incest" discuss Hamlet's mother or the Cenci, under "bastardy" Lear's Edmund, William the Conqueror, Alexander Hamilton or Nancy Hanks. There is no reference to Jean Valjean in "burglary", to the Silver Box in "larceny", to Rigoletto in "innkeepers", to any in the long line from Cain, Clytemnestra and lean Cassius to Raskolnikoff, Molineux and Dr. Crippen in "homicide". So we do not expect to find Tristan, Aegisthus, Anna Karenina, Emma Bovary, Pagliacci's wife, Hester Prynne and the hero of Trafalgar in "adultery", *Jarndyce* v. *Jarndyce* in "equity", *Bardell* v. *Pickwick* under "witnesses" or "evidence", or Lucretia, Tess of the D'Urbervilles or the Rape of the Lock under "rape". Sonnets 18, 107 and 147 are not under "landlord and tenant", Lady Windermere's Fan under "trover", Ibsen's Nora, the Donation of Constantine or the *Atlantic Monthly's* Anne Rutledge letters under "forgery".

So we should not expect to find a discussion of suretyship and the Merchant of Venice in a book on usury. But here it is in learned and fascinating form. For here is a discussion of Antonio's friendship in the light of the prudential morality of Elizabethan capitalists and courtiers and references to the surety-hostage theme in Orestes and Pylades and in Hebrew literature and religion and to the friendship-surety situation in the eighty-fourth Sonnet. That sonnet is almost a scenario of the Merchant of Venice. There is also a note interesting to the lawyer on the connection between the Merchant and the great fourteenth century Perugian glossator Bartolus. For to his *Processus Satanae,* Satan's suit against the Redeemer before God's tribunal, is attributed the probable origin of the trial scene in the *Merchant.*

These remarks will suggest to the busy practitioner, and correctly, that this is not the book to turn to for a quick answer to the question: What is the maximum permissible interest rate in Kansas or Alabama and are corporations excepted from the rule? For this is not a book written by a lawyer for lawyers. Rather is it a scholarly, well documented study by a professor of social sciences of "the long and curious contest over the commandment in Deuteronomy on usury, which prohibits loans at interest to brothers but not to strangers".

Chapter I discusses medieval universalism and the Deuteronomic double standard. Here are succinct references to Saints Jerome, Ambrose, Albertus Magnus, Aquinas and to the Lateran Councils. Chapter II develops this thesis: "The German Reformation witnessed the outbreak of the modern revolt against the Hebraic and medieval Christian prohibitions of usury. Within less than three decades after the day when Luther stood before the boy Emperor at Worms, there occurred a fateful desertion of a principle which had claimed the allegiance of men in the Judaeo-Christian tradition for more than two millenia, the principle that the taking of interest from a co-religionist was utterly antithetical to the spirit of brotherhood."

In Chapter III, Dr. Nelson points out how Calvin's exegesis spelt "the demise of Deuteronomy". He was the "first religious leader to exploit the ambivalence of the Deuteronomic passage in such a fashion as to prove that it was permissible to take usury from one's brother". This book is especially interesting as a specific study of one aspect of the fascinating, controversial relationship between religion and the rise of capitalism developed by such familiar figures as

Troeltsch,[1] Weber[2] and Tawney.[3] As such, it is a most rewarding volume.

BEN W. PALMER
Minneapolis, Minnesota

FIVE JEWISH LAWYERS OF THE COMMON LAW. *By Arthur L. Goodhart. London: Oxford University Press. 1949. $1.50. Pages 74.*

Five Jewish Lawyers of the Common Law is the story of five heroes in the romance of Anglo-American jurisprudence—five great servants in the cause of justice—five great soldiers in the ever-present struggle for a government of laws and not of men.

Two of the five lawyers were Englishmen—Sir George Jessel and Rufus Isaacs; two were Americans—Louis D. Brandeis and Benjamin Nathan Cardozo; the fifth was a man of three great common law nations—Judah P. Benjamin, one-time citizen of the United States of America, the Confederate States of America and Great Britain.

Author Goodhart, Professor of Jurisprudence at the University of Oxford, begins his volume with the "Benjamin Story". It is a fascinating tale: the story of the man who became the leader of the Louisiana Bar in the 1840s; who declined President Fillmore's nomination to serve as an Associate Justice of the Supreme Court in 1853 to engage in the more active career of United States Senator; who served the South as Attorney General, Secretary of War and Secretary of State; and who, at the age of 54, began life anew as a law student at Lincoln's Inn. Judah P. Benjamin became a Queen's Counsel in 1870, only five years after his thrilling escape from the Union Armies. In 1877 he was counsel in thirty of the sixty-five cases reported in the Appeal Cases for the House of Lords. And at his death, in 1884, he was probably the most distinguished lawyer in the Anglo-American legal world, described by the Lord Chancellor as a lawyer of the "highest honour, united with the greatest kindness and generosity" (page 14).

Unlike Judah P. Benjamin, Sir George Jessel never knew adversity. His father was a great land-owner; his scholastic career was a succession of fellowships and gold medals; he was counted a wealthy practitioner after only three years at the Bar; and by the time he had reached the age of 37 his practice was so large that he "applied for silk". Four years later he became a Queen's Counsel and a Bencher at Lincoln's Inn.

Sir George Jessel was elected to Parliament in 1868, became Solicitor General in 1871, and was appointed Master of the Rolls—number three post in England's judicial hierarchy—in 1873. He was president of the Court of Appeal during the last two years of his career on the Bench.

The boy from Kentucky who became the number one student in the history of Harvard Law School is the subject of Professor Goodhart's third biography. His name was Louis D. Brandeis, at once "the people's lawyer" and the counsel to great corporations, the Supreme Court Justice who "taught that true Americanism was based on a belief in the principles of freedom and equality which had guided the forefathers of the nation" (page 38).

In the 1860s Rufus Isaacs was the "terror of his schoolmasters [and] the scandal of the neighborhood" (page 39). At the age of 16 his father forced him to sign as ship's boy on a vessel bound for South America and India. By the time he was 20, he had become a member of the Stock Exchange. Four years later he was a ruined man, saddled with debts.

Rufus Isaacs was at the railroad station, waiting for the train that was to carry him to Liverpool and a ship bound for South America when his brother arrived breathlessly to tell him that his mother was ill and that he must return. Mrs. Isaacs was not ill; she was a woman who managed to have hysterics whenever she wanted her way; and her "way" on that eventful date was that Rufus should remain in England and study law.

Isaac's legal career began auspiciously and he was soon recognized as one of the ablest juniors at the Bar. He was made a King's Counsel in 1898; was elected to Parliament in 1904; was appointed Solicitor General in March, 1910; became Attorney General in October, 1910; and was named Lord Chief Justice in 1913. His legal philosophy: "The Bar is never a bed of roses. It is either all bed and no roses, or all roses and no bed" (page 42).

World War I interrupted the judicial career of Lord Justice Isaacs who was sent to the United States as a special envoy in 1915, and again as head of the British legation in 1917. From 1921 to 1926 he was Viceroy of India, and upon his return to England was made a marquess. He served briefly as Foreign Secretary before his death in 1934.

Fifth of the volume's legal heroes is Benjamin Nathan Cardozo, son of a disgraced Boss Tweed judge, who eventually became "the symbol of justice" to the "ordinary man in the street" (page 61). Mr. Justice Cardozo's professional accomplishments

1. Ernst Troeltsch, *The Social Teaching of the Christian Churches* (2 volumes London 1931, 1949). First published in Germany in 1911.

2. Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (London 1930, 1948) First published in Germany in 1904-05.

3. R. H. Tawney. *Religion and the Rise of Capitalism* (New York 1926). See also J. L. Hammond and Barbara Hammond, The Rise of Modern Industry (7th ed. London 1947) 12, 53, Jeremy Bentham's *Defence of Usury*, in spite of "that celebrated heathen Aristotle", a letter to Adam Smith from Russia in 1787, originally printed in 1816 and found in 3 Bentham's *Works*, (Edinburgh 1893) 3-29; the use of Bentham and Calvin by Richard H. Dana, Jr., and others arguing for repeal of usury laws in Massachusetts in 1881 in Economic Tracts No. 4, Series of 1880-1881, New York, The Society for Political Education. See also 15 *Encyclopedia of the Social Sciences* (New York 1935) 193-197; Mishnah, translation by Hyman E. Goldin, New York, 1913, pages 98-121 on usury in the Mosaic law and the Talmud; Joseph Dorfman, *The Economic Mind in American Civilization* (New York, volumes 1 and 2, 1946, and vol. 3, 1949) passim. (See the indexes to these volumes). Herbert Heaton, *Economic History of Europe* (New York 1936) 201-203, 381, 495; Bede Jarrett, *Social Theories of the Middle Ages* (Westminster, Md. 1942) 117, 141, 163-173. For Aquinas on "the sin of usury" see his *Summa Theologica*, (Benzinger Bros. ed. New York 1947) volume 2, pp. 1518-1522. On usury in English legal history see Holdsworth, *History of English Law* (Boston, 1932) index "usury" in volume 10; 1 James F. Stephen, *History of the Criminal Law of England* (London, 1883) 10, 3 *id.* 192-199.

and his record as Chief Judge of the New York Court of Appeals and as Associate Justice of the United States Supreme Court are too well known to be repeated here. But it is interesting to note the influential rôle played by his old tutor, Horatio Alger, who helped shape Cardozo's ideals of the "American way" and developed in him a love for English literature and the English language.

Five Jewish Lawyers of the Common Law was not prepared for publication in the book form. Rather it is a printed lecture (somewhat expanded) which was originally delivered in 1947 before the Jewish Historical Society of England.

Professor Goodhart's efforts have resulted in an excellent volume. Its main defect (if any) is in its brevity; lawyers will find seventy-four pages all too few for the biographies of five of their leaders. But perhaps the book serves an even more admirable function in whetting lawyers' reading appetites and in referring them to more detailed histories of and commentaries on the lives of these five great servants of the common law.

ALBERT P. BLAUSTEIN
New York, New York

AVAILABILITY FOR WORK. *By Ralph Altman. Cambridge: Harvard University Press. 1950. $4.50. Pages xv, 350.*

One of the means of restricting payment of unemployment benefits to those claimants whose unemployment is involuntary and who are genuinely attached to the labor market is to require as a condition of eligibility for benefits that the claimant be "available for work". Such provisions are found in the Unemployment Compensation Laws of all the states.

Mr. Altman, an appeals analyst with the Bureau of Employment Security of the United States Department of Labor, has undertaken to analyze and appraise a large number of administrative and judicial decisions applying and defining this test of "availability" in various factual situations.

The book, it is stated in the author's preface, is intended primarily for the use of students and workers in the social insurance field. This being the principal purpose, it is not surprising that the book is devoted in large part to an exposition of what the author believes the law should be.

He is generally critical of the trend in court decisions to apply strictly the statutory requirement that the claimant demonstrate his "availability" for work, and urges that the administrative agencies administering unemployment compensation programs should adopt an attitude "averse to legalism".

The author approves the suggestion that unemployed workers should have "the benefit of any doubt" as to their "availability", and suggests that there should be a presumption that the claimant is "available" for work. He is in disagreement with the court-made rule that the claimant has the burden of proving his "availability" for work, and is likewise critical of the rule requiring that the claimant must actively seek work. He likewise disapproves decisions to the effect that in order to be eligible a claimant must be willing to accept work on night-shift jobs.

Probably most lawyer readers will find the book is helpful, not as a text, but only as a means of finding a large number of decisions (some of which have not previously been published in readily accessible form) rendered by state courts and by administrative agencies applying the statutory test of "availability" to specific situations.

FRANK E. COOPER
Detroit, Michigan

THE STRENGTHENING OF AMERICAN POLITICAL INSTITUTIONS. *By A. S. Mike Monroney, et al. Ithaca, New York: Cornell University Press. 1949. $2.00. Pages 134.*

In the spring of 1949, Cornell University offered a series of lectures on "America's Freedom and Responsibility in the Contemporary Crisis", designed to stimulate discussion upon controversial issues. These lectures have been published with similar purpose.

Representative Monroney of Oklahoma gives an appraisal of the Legislative Reorganization Act of 1946 in which he reviews the reorganization of the committee structure and the establishment of a skilled professional staff for legislative purposes. He estimates that about 75 per cent of the goal set by the Act has been attained. It has failed, in his opinion, to establish a more effective fiscal control and to enforce the requirement for public hearings on appropriations. He would score the entire program at a bare 51 per cent. He poses three problems for further study and for some remedial measures: the seniority rule, the veto power of the House Rules Committee and the filibuster in the Senate.

Thomas J. Hargrave, president of Eastman Kodak Company, gives a forthright survey of the problems attendant upon industrial mobilization. He furnishes heartening details of continued preparedness on an efficient basis with a view to unification of coöperative effort.

The highlight of the book is the controversy involving the contribution of Thurman Arnold on "The Case against the Federal Loyalty Program". He reviews some of the instances where questionable practices lead to difficulties for federal employees against whom competent evidence of disloyalty was not produced. "The evidence on which such convictions may be had is such that it would stand up in no American court. This process is one which we associate with Soviet Russia, not with America. The answer, therefore, is that with our loyalty program we are destroying, rather than strengthening American political institutions and ideals." He allows his emotions to run riot with his conclusions to the extent of contending that the Communists in America today ". . . present about the same amount of

(Continued on page 582)

Review of Recent Supreme Court Decisions

COMMERCE

Interstate Commerce Commission Has Power To Fix Points Beyond Which Carriers May Not Perform Switching and Spotting Operations in Industrial Plants as Part of Line-Haul Service

■ *United States* v. *United States Smelting, Refining & Mining Company*, 339 U. S. 186, 94 L. ed. Adv. Ops. 488, 70 S. Ct. 537, 18 U. S. Law Week 4201. (No. 173, decided March 27, 1950.)

This case involved the extensive switching and spotting services rendered inside the plants of two smelting companies by rail carriers serving them. Acting in the interest of establishing a uniform and equal service for shippers, the ICC instituted proceedings to determine where the carriers' line-haul transportation service ended and the extent of the service that the carriers might render in the discharge of their obligation to deliver freight at the plants. After hearings, the ICC found that the carriers' obligation for transportation service customarily ends when delivery is made at a convenient point on the siding inside or outside a consignee's plant, and that the delivery at such a convenient point is the extent of service that may be performed under the line-haul rate. The Commission entered orders enjoining the carriers from performing switching and spotting service for the smelting companies beyond the receiving yards or interchange tracks of the plants, acting under its duty to enforce § 6 (7) of the Interstate Commerce Act which prohibits departure from filed tariffs and the rendering of preferential services. A statutory three-judge district court found the orders unlawful and remanded the matter to the Commission, temporarily enjoining the Commission from enforcing its orders. The Commission reopened the case but took no more evidence. It restated the ground for its action and entered cease and desist orders against the carriers. The District Court again held the orders unlawful and permanently enjoined their enforcement.

The Supreme Court reversed on appeal, Mr. Justice MINTON delivering the opinion of the Court. He declares that the Commission's authority to establish the point where line-haul service begins and ends is undoubted and that there was substantial evidence to support the Commission's finding that the convenient points for ending line-haul service were at the interchange points. He says that the spotting and switching operations beyond these points without compensatory charges would result in preferential service. Because the need for switching varies from plant to plant and some may require no switching at all beyond the interchange point, he says that for the carriers to set a tariff that extends the line-haul rate beyond the interchange point gives shippers that require interplant switching a preference over those that do not.

The scope of the Commission's proceeding is only to define what is embraced in line-haul transportation, he says in reply to appellee's contention that the tariffs now in effect compensate the carriers for line-haul *and* interplant services and that to require extra payment for interplant services would be to require the smelters to pay twice for the same service. The Commission has authority to exclude rate questions from the proceeding, he declares, and if they wish, the carriers may file a new tariff to conform their charges to the service required by the Commission's order.

Mr. Justice JACKSON dissented.

The CHIEF JUSTICE and Mr. Justice DOUGLAS took no part in the consideration or decision of the case.

The case was argued by Allen Crenshaw for the Interstate Commerce Commission, by Joseph W. Bishop, Jr., for the United States, by John F. Finerty and Charles A. Horsky for the smelting companies, and by Otis J. Gibson and Elmer B. Collins for the carriers.

FEDERAL SAFETY APPLIANCE ACT Federal Safety Appliance Act Imposes Absolute Liability upon Railroad To Equip Cars with Couplers that Operate Automatically

■ *Affolder* v. *New York, Chicago and St. Louis Railroad Company*, 339 U. S. 96, 94 L. ed. Adv. Ops. 439, 70 S. Ct. 509, 18 U. S. Law Week 4185. (No. 200, decided March 13, 1950.)

Affolder was injured when two cars failed to couple in an accident that occurred while he was at work in respondent's yards. As a result he lost a leg and brought suit in the District Court, alleging violation of the Federal Safety Appliance Act and the Federal Employers' Liability Act. On trial to a jury, he was awarded a judgment for $80,000. The Court of Appeals for the Eighth Circuit reversed, basing its decision on the reasoning that the trial court's charge to the jury contained "no explanation of the legal effect" of the direct proof of the separation of the cars "and the permissible use which the jury might make of it. . . ."

The Supreme Court reversed the Court of Appeals and affirmed the District Court in an opinion by Mr. Justice CLARK. He declares that the Court of Appeals erred when it concluded that the jury could find for plaintiff only if it inferred "bad condition of the couplers and consequent violation of plaintiff's statutory duty". He refers to *O'Donnell* v. *Elgin, Joliet & Eastern R. Co.*, 338 U. S. 384 (1949) (see 36 A.B.A.J. 308; April, 1950) where the Court held that the duty imposed upon railroads by the Federal Safety Appliance Act is not based on negligence but is an absolute one requiring performance on the occasion in question. This assumes, of course, he continues, that the coupler was properly opened by the

Reviews in this issue by Rowland L. Young

switchman. The charge emphasized the fact that it was for the jury to determine the reason why the cars separated, he says, and the jury found against respondent.

Mr. Justice FRANKFURTER noted that he would dismiss the writ of *certiorari* for the reasons stated in his opinion in *Carter* v. *Atlanta & St. Andrews Bay R. Co.*, 338 U. S. 430 (see 36 A.B.A.J. 308; April, 1950).

Mr. Justice REED dissented, noting that he would affirm on the ground that the trial court failed to make it clear to the jury that the carrier was not liable under the Act if the failure to couple was due to negligence in setting the coupler.

Mr. Justice DOUGLAS took no part in the consideration or decision of this case.

Mr. Justice JACKSON wrote a dissenting opinion. He remarks that the judges of the Court of Appeals thought that the trial judges' charge was confusing, and that he does not see how the Supreme Court can be sure that the charge did not mislead a jury of laymen. He adds that he thinks that *certiorari* was improvidently granted, citing the *Carter* case and *Wilkerson* v. *McCarthy*, 336 U. S. 53 (see 35 A.B.A.J. 415; May, 1949), as stating his reasons.

The case was argued by William H. Allen for Affolder, and by Lon Hocker for the railroad.

HABEAS CORPUS

Authority Appointing General Court Martial Has Discretion To Determine Nonavailability Justifying Omission of Member of Judge Advocate General's Department

■ *Hiatt* v. *Brown*, 339 U. S. 103, 94 L. ed. Adv. Ops. 443, 70 S. Ct. 495, 18 U. S. Law Week 4187. (No. 359, decided March 13, 1950.)

Brown was convicted of murder by a general court martial while serving as a soldier in Germany. The law member of the court martial that tried him was a colonel of field artillery. The only officer of the Judge Advocate General's Department appointed on the general court-martial detail was a captain who was designated as an assistant trial judge advocate. He was absent from the trial on verbal order of the commanding general. On petition for a writ of *habeas corpus*, the District Court for the Northern District of Georgia ordered Brown's release from prison on the ground that the court martial was improperly constituted and lacked jurisdiction because of the absence of a member of the Judge Advocate General's Department on the court. The Court of Appeals for the Fifth Circuit affirmed on the same ground, and the additional one that errors and irregularities had deprived Brown of due process of law. (35 A.B.A.J. 853, October, 1949).

The Supreme Court reversed in an opinion delivered by Mr. Justice CLARK. He notes that the Eighth Article of War requires that the law member of a general court martial "shall be an officer of the Judge Advocate General's Department [now the Judge Advocates Corps], except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member. . . ." He says that the phrase "available for the purpose" expresses a "clear intent that the concept of availability should include the exercise of discretion by the appointing authority". This exercise of discretion may be reviewed by the civil courts only if a gross abuse of the discretion would have given rise to a defect in the jurisdiction, he declares. Nothing in the record indicates any improper exercise of the discretion, he holds. As for the Court of Appeals' holding that certain errors committed by the court martial had deprived Brown of due process, he says that a petition for a writ of *habeas corpus* does not open that question for review, the sole inquiry being into jurisdiction.

Mr. Justice DOUGLAS took no part in the consideration or decision of the case.

Mr. Justice Burton wrote a concurring opinion. His view is that the article that deals with the availability of an officer of the Judge Advocate General's Department is purely directory. Even if the discretion in determining this preliminary administrative question were grossly abused he does not think that the Court should permit a review.

The case was argued by Stanley M. Silverberg for Hiatt, and by Walter G. Cooper for Brown.

JURY

Presence of Employees of Federal Government on Jury in Trial of Communist on Charge of Contempt of Congress Does Not Deny Accused Right to Trial by Impartial Jury

■ *Dennis* v. *United States*, 339 U. S. 162, 94 L. ed. Adv. Ops. 461, 70 S. Ct. 519, 18 U. S. Law Week 4194. (No. 14, decided March 27, 1950.)

Dennis, the General Secretary of the Communist Party of the United States, was convicted of contempt of Congress following his refusal to appear before the House of Representatives' Committee on Un-American Activities in response to a subpoena. On *certiorari* in the Supreme Court, the sole question was whether Government employees could properly serve on the jury that tried Dennis and found him guilty. It was urged that government employees would be afraid to risk the charge of disloyalty and possibility of discharge from their jobs that might arise from a verdict of not guilty.

The opinion of the Court, affirming the judgment of the Court of Appeals for the District of Columbia upholding conviction, was delivered by Mr. Justice MINTON. He noted that Chief Justice Hughes had considered the question in 1935 in upholding the the constitutionality of the federal statute qualifying federal employees for jury duty. At that time, Mr. Justice MINTON notes, it was held that accused persons were free to show actual bias in government employees, but that bias was not to be inferred solely from the fact that jurors were government employees. This was affirmed last term in *Frazier* v. *United States*, 335 U. S. 497, he declares. No question of actual bias is here involved, he says, and "Vague conjecture does not convince that Govern-

ment employees are so intimidated that they cringe before their Government in fear of investigation and loss of employment if they do their duty as jurors, which duty this same Government has imposed upon them."

Mr. Justice REED concurred in the opinion and judgment of the Court, noting that he reads the opinion to mean that "Government employees may be barred for implied bias when circumstances are properly brought to the court's attention which convince the court that Government employees would not be suitable jurors in a particular case".

Mr. Justice DOUGLAS and Mr. Justice CLARK took no part in the consideration or decision of this case.

Mr. Justice JACKSON concurred in the result. In a separate opinion, he says that he adheres to his dissent in the *Frazier* case, but that he finds nothing urged here that was not within the contemplation of the Court in that decision. Dennis is arguing for a partial repeal of the *Frazier* doctrine, he says, a repeal for Communists only. Communists are entitled to the rights and advantages of any defendant, he says, but equal justice under the law entitles a Communist to no more.

Mr. Justice FRANKFURTER wrote a dissenting opinion in which he says that he would not extend the area of the *Frazier* precedent and apply it in such a case as this which concerns the security of the nation. A government employee should not be asked whether he would feel free to decide against the Government in a case that common understanding regards as involving disloyalty to the United States. To take appropriate measures to avert injustice towards a member of a despised group is not "to coddle Communists", he says, but to respect our professions of equal justice for all.

Mr. Justice BLACK wrote a dissenting opinion. He would reverse conviction, he says, because no juror can meet the test of impartiality if he has good reason to fear that a vote for acquittal would subject him to harassing investigations and perhaps cost him his job. The opinions in the *Wood* and *Frazier* cases, involving theft and dope-peddling, "clearly indicated" that particular issues or circumstances might require exclusion of government employees in order to assure an impartial jury. No defendant whatever his political affiliation charged with the offense of which defendants were convicted should be forced to accept a government employee as a juror, he declares, for such a juror cannot give the impartial trial that the Sixth Amendment guarantees.

The case was argued by George W. Crockett, Jr., for Dennis, and by Philip B. Perlman for the United States.

PLEADING

Whether Japanese Occupation of Philippines Prevented Plaintiff from Acquiring Information Concerning Property Allegedly Requisitioned by United States Held Not Presented by Record

■ *Standard-Vacuum Oil Company* v. *United States*, 339 U. S. 157, 94 L. ed. Adv. Ops. 474, 70 S. Ct. 545, 18 U. S. Law Week 4193. (No. 18, decided March 27, 1950.)

The Standard-Vacuum Oil Company filed suit in the Court of Claims on December 5, 1947, to recover just compensation for certain of its properties in the Philippine Islands allegedly requisitioned by the United States for military purposes. On March 24, 1948, an amended petition was filed including for the first time the two claims involved here covering property allegedly taken in 1941 and 1942. The Court of Claims dismissed the two claims on the ground that they were filed more than six years after they had accrued and were therefore barred by Section 156 of the Judicial Code.

An opinion by Mr. Justice MINTON, speaking for the Supreme Court, affirms the dismissal. The record does not present the question "whether deprivation of access to information during the Japanese occupation of the Philippine Islands could or did affect the operation of the six-year statute", he says. The Court might take judicial notice of the Japanese occupation, he declares, but it cannot judicially know the facts of petitioner's information or lack of information. Accordingly, he vacates the judgment and remands the cause leaving it at the discretion of the Court of Claims to permit further pleading.

Mr. Justice DOUGLAS took no part in the consideration or decision of this case.

The case was argued by Albert R. Connelly for Standard-Vacuum Oil Company, and by Newell A. Clapp for the United States.

PUBLIC OFFICERS

Refusal To Unlock Door of Home to Permit Health Inspection of Premises, Unaccompanied by Violence or Threat of Violence, Does Not Constitute "Interfering" with Officer in Performance of His Duties

■ *District of Columbia* v. *Little*, 339 U. S. 1, 94 L. ed. Adv. Ops. 424, 70 S. Ct. 468, 18 U. S. Law Week 4173. (No. 302, decided February 20, 1950.)

Respondent was convicted and fined in the Municipal Court for the District of Columbia for refusing to unlock the door of her home to admit a District health inspector who had no search warrant. The Municipal Court of Appeals reversed, holding that the Fourth Amendment forbade the inspector to enter without a search warrant. The United States Court of Appeals for the District of Columbia affirmed. (35 A.B.A.J. 849; October, 1949).

Speaking for the Supreme Court, Mr. Justice BLACK wrote an opinion affirming. The facts do not provide a basis for determining the application of the Fourth Amendment, he says, for even if the inspector had a lawful right to enter without a warrant, which the Court does not decide, respondent's conduct was not an interference with the officer that made her guilty of a misdemeanor. She neither used nor threatened violence of any kind, he notes, and nothing in the District regulation imposes a duty on home owners to assist health officers to enter and inspect their homes.

Mr. Justice DOUGLAS took no part in the consideration or decision of the case.

Mr. Justice BURTON, joined by Mr. Justice REED in a short dissenting opinion, declared that he thought that respondent's actions were an "effective interference" with an officer in the performance of his duties, and that her conduct violated the ordinance. He also says that the duties of the inspector were of such "reasonable, general, routine, accepted and important character" that they were performed lawfully without the search warrant required by the Fourth Amendment.

The case was argued by Chester H. Gray for the District, and by Jeff Busby for Little.

RAILROADS

Carmack Amendment Is Applicable To Transportation by Rail in the United States of Goods Shipped from Abroad

■ *Reider* v. *Thompson*, 339 U. S. 113, 94 L. ed. Adv. Ops. 449, 70 S. Ct. 499, 18 U. S. Law Week 4183. (No. 403, decided March 13, 1950.)

Reider filed an action in the District Court under the Carmack Amendment to the Interstate Commerce Act alleging that he was the lawful holder of a bill of lading covering a shipment of wool and skins received by the Missouri Pacific Railroad, of which Thompson was trustee, at New Orleans for shipment to Boston. The complaint stated that the shipment was in good condition when received by the railroad at New Orleans and was damaged on arrival at Boston. It was stipulated that the shipment originated in Buenos Aires and was transported by steamship to New Orleans on an ocean bill of lading, freight for which was payable at New Orleans. The District Court granted a motion to dismiss the action on the ground that the complaint did not state a cause of action upon which relief could be granted. The Court of Appeals affirmed (see 35 A.B.A.J. 848; October, 1949), characterizing the railroad bill of lading as a supplemental bill issued by the domestic carrier to cover its portion of the transportation of a "through foreign shipment". The Court of Appeals held that the Carmack Amendment was not intended to apply to such a foreign shipment.

The opinion in the Supreme Court reversing was written by Mr. Justice MINTON. Whether the commerce is properly characterized as foreign or domestic is not material, his opinion states, for the primary problem is one of liability, and the fact that the shipment originated abroad does not take the case without the Carmack Amendment. There was no through bill of lading, the opinion declares, and the railroad is obligated under its separate and distinct domestic contract of carriage. The contract for ocean transport terminated at New Orleans, and the railroad's separate contract was squarely within the provisions of the statute. The opinion expressly disavows an intimation that the railroad might be liable for damage attributable to the ocean carrier.

Mr. Justice DOUGLAS and Mr. Justice JACKSON took no part in the consideration or decision of the case.

Mr. Justice FRANKFURTER wrote a dissenting opinion in which he says that he agrees with the Court of Appeals. The words of the Carmack Amendment should not be taken "out of the illuminating context of the regulatory scheme of which they are a part", he declares.

The case was argued by Eberhard P. Deutsch for Reider, and by Truman Woodward, Jr., for Thompson.

MANUSCRIPTS FOR THE JOURNAL

■ The *Journal* is glad to receive from Association members any manuscript, material, or suggestions of items, for consideration for publication. Preponderantly, our columns are filled with articles planned and solicited by members of the Board of Editors or Advisory Board or written by them; but each issue contains articles selected from those submitted to us by others. With our limited space, we can publish only a few of those submitted; but every article we receive is considered carefully by members of the Board of Editors unless for some reason it is plainly unsuited for our publication. Articles in excess of 3000 words including footnotes cannot ordinarily be considered; exceptions are sometimes made as to solicited contributions. Communications from members on subjects of interest to the profession are invited, and will be published if and when our limited space permits. They should not exceed 300 to 350 words in length; if they do, the Board of Editors may reject or condense. The facts stated and views expressed in any article identified with an individual author are upon his responsibility.

As the work of the Board of Editors is carried on by men who are widely separated in distance and busy in their own professional pursuits, time often elapses before a decision can be made as to whether a proffered article is acceptable and space can be made available for it. We cannot assure that submitted manuscripts not accepted will be returned, although that may usually be done.

Courts, Departments and Agencies

E. J. Dimock • EDITOR-IN-CHARGE Lydia A. G. Stratton • ASSISTANT

Aliens . . . California Alien Land Law . . . California statute prohibiting ownership or leasing of land by aliens ineligible to United States citizenship held invalid and unenforceable on ground that it conflicted with the United Nations Charter.

■ *Fujii* v. *State of California*, Calif. Dis. Ct. App., Second Appellate District, Division Two, April 24, 1950, Wilson, J.

In what appears to be the first decision in which the Charter of the United Nations has been invoked to invalidate a state law, the California District Court of Appeal held § 2 of the California Alien Land Law prohibiting the ownership or leasing of land by aliens ineligible to United States citizenship invalid and unenforceable on the ground that it conflicted with the principles set forth in the Charter. The opinion by Wilson, J., concurred in by Presiding Justice Moore and Justice McComb, was rendered in an action brought by an alien Japanese to determine whether or not an escheat had occurred under the provisions of the Alien Land Law as to real property he had acquired by grant deed in 1948. Observing that the United Nations Charter was a treaty ratified by the United States in 1945 and hence under Article VI, § 2 of the Federal Constitution took precedence over any conflicting state laws, the Court pointed out that the Charter guarantees universal respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. It was further shown that when the Land Law was adopted in 1920 it was applicable to the nationals of several countries by reason of their ineligibility to citizenship, but that by amendments to the federal naturalization laws expanding the classes of nationals eligible to citizenship only Japanese and an "insignificant number" of other Asiatics remained ineligible under the terms of the Land Law to own or lease real property in California. Such statutory discrimination presently directed against Japanese aliens solely because of their race was deemed incompatible with the declared principles and spirit of the Charter and with Article 17 of the Declaration of Human Rights proclaiming the right of "everyone" to own property.

In rejecting plaintiff's further contention that the Alien Land Law was also a violation of the Federal Constitution, the Court maintained that the decisions of the United States Supreme Court and the California Supreme Court over the past thirty years holding the Law constitutional had not yet been overruled, despite the contrary conclusion reached by the Oregon Supreme Court in *Namba* v. *McCourt*, 204 P. (2d) 569, 35 A.B.A.J. 499, June, 1949. Referring to the cases cited by plaintiff to sustain his theory, the Court stated that the holding of the United States Supreme Court in *Oyama* v. *California*, 332 U.S. 633, was limited to the unconstitutionality only of § 9 of the Alien Land Law dealing with presumptions and the burden of proof, and that no question relating to the Law was involved in either *Shelly* v. *Kraemer*, 334 U.S. 1, or *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410.

EDITOR'S NOTE: The omission of a citation to United States Law Week or to the appropriate official or unofficial reports in any instance does not mean that the subject matter has not been digested or reported in those publications.

Appeal and Error . . . mandamus . . . federal district court order denying transfer of civil antitrust action to another district held nonappealable as interlocutory but nevertheless reviewable by mandamus.

■ *Ford Motor Co. et al.* v. *Ryan*, C.A. 2d, May 8, 1950, Frank, C. J.

In an action brought in the United States District Court for the Southern District of New York on January 8, 1948, by plaintiffs Harry Ferguson and Harry Ferguson, Inc., against the Ford Motor Company and others based on an alleged conspiracy in violation of the Sherman and Clayton Acts and an alleged conspiracy to infringe certain of plaintiffs' patents, defendants' motion to dismiss the complaint under the doctrine of *forum non conveniens* on the ground that determination of the issues could be had at greater convenience to the parties and witnesses if the action were brought in the Federal District Court for the Eastern District of Michigan, Southern Division, was denied by Ryan, C. J., on April 21, 1948. He ruled at that time that the doctrine of *forum non conveniens* was inapplicable as a matter of law because the action arose under the antitrust laws, and that, even were the doctrine applicable, the defendants failed to show that the facts as they then appeared justified dismissal. Defendants subsequently moved to transfer the action to the Eastern District of Michigan pursuant to § 1404 (a) of the Judicial Code providing for a change of venue for the convenience of parties and witnesses in the interest of justice to any federal district where the action "might have been brought". Denying the motion, Ryan, D. J., ruled on January 6, 1950, that, although the court had the power to transfer

under § 1404 (a), there was no "preponderant balance" of convenience in defendants' favor, inasmuch as the nonresident defendants failed to show appreciable hardship in obtaining proofs in New York, the New York court alone could compel the attendance of important witnesses, a view of the plants in Michigan was not imperative, defendants' business would not be unusually affected by New York trial and the alleged unlawful activities were nation-wide. Defendants thereupon petitioned the Court of Appeals for the Second Circuit for a writ of mandamus directing Ryan, D. J., to vacate his order denying their motion for transfer, and also appealed from the same order. The petition was denied and the appeal dismissed.

In an opinion written by Frank, C. J., the Court ruled that the order refusing to direct the transfer was interlocutory and hence not appealable, but nevertheless involved a sufficiently "extraordinary cause" as to warrant review by a writ of mandamus. Noting the contrary position taken by Swan, C. J., in his concurring opinion, that the Court lacked the power to grant a writ of mandamus, the Court maintained that this was the kind of interlocutory order that could be dealt with by way of mandamus since, if defendants should lose in the lower court, any error in the interlocutory order would probably be incorrectible on appeal; it would be difficult, it was stated, to show that a different result would have been reached had the suit been transferred. On the other hand, should defendants win on the merits below, they could not collect as costs the additional expenses to them, if any, due to the court's failure to order the transfer. On the merits, the Court held that plaintiffs' "venue-privilege", a standard in the doctrine of *forum non conveniens* deemed to have been embodied by Congress into § 1404 (a), precluded transfer since defendants failed to make out a "strong enough" case for a change of venue to overcome the privilege.

L. Hand, C. J., concurring, expressed the view, not shared by Frank, C. J., that the order denying the transfer would have been erroneous if plaintiffs' venue-privilege were not a factor and the choice between New York and Detroit were "unweighted".

Constitutional Law . . . personal, civil and political rights . . . admission of qualified Negro applicant to University of Maryland Nursing School ordered despite state's offer under Southern Regional Compact of scholarship training in nursing in superior Tennessee medical college.

■ *McCready* v. *Byrd et al.*, Md. Ct. App., April 14, 1950, Markell, J.

Reversing on appeal the order of the trial court denying a petition for mandamus to compel the admission of petitioner, a Negro, to the School of Nursing of the University of Maryland (see review in 35 A.B.A.J. 1017, December, 1949), the Court of Appeals of Maryland held that petitioner was entitled to secure her nursing education at the state institution despite the state's offer, in accordance with the Southern Regional Compact, of scholarship training at the Meharry Medical College in Tennessee at a total cost not exceeding the cost of attending the Maryland school. Although it appeared from uncontradicted testimony that the training in nursing offered at the Meharry Medical College was not only equal but superior to that available at the University of Maryland School of Nursing, the Court ruled that the use of the scholarship exchange compact did not discharge the state's independent obligation to provide substantially equal educational facilities to Negro students. The question left open by the Court in *University of Maryland* v. *Murray*, 169 Md. 478, as to whether with aid in any amount it was sufficient to send Negroes outside the state for like education was deemed to have been subsequently decided by the United States Supreme Court with regard to legal education on broad grounds that were considered no less applicable to a school of nursing than to a school of law. Pursuant to *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337, and *Sipuel* v. *Board of Regents of University of Oklahoma*, 332 U.S. 631, it was pointed out that a state's obligation to give the "protection of equal laws" can only be performed within its own jurisdiction and hence resort to the payment of tuition fees in other states did not remove or validate racial discrimination within the state.

Crimes . . . treason . . . treason conviction of American citizen who participated in German propaganda program designed to convince Americans that European invasion would be disastrous upheld on appeal.

■ *Gillars* v. *U.S.*, C.A.,D.C., May 19, 1950, Fahy, C. J.

Appellant, an American citizen convicted by a jury of treason for her participation during World War II in the German propaganda program, particularly in the recording of a radio drama, entitled "Vision of Invasion" and designed as an instrument of psychological warfare to convince Americans that the European invasion would be disastrous, appealed on the grounds, *inter alia*, that treason could not be committed by words, that the crime of treason did not have extraterritorial scope, that appellant was entitled to asylum in Germany and that the United States District Court for the District of Columbia lacked jurisdiction over her, that the introduction in evidence of appellant's recordings deprived her of the protection of the Fifth Amendment against self-incrimination and that the use of earphones during the trial was a denial of a public trial in violation of the Sixth Amendment. Unanimously affirming the judgment below, the Court of Appeals found no reversible error and held that the evidence furnished an adequate basis for the jury to find appellant guilty of treason against the United States.

The Court held that the instant prosecution was not barred by the First Amendment's guarantee of free speech since words spoken as part of the enemy program of propaganda warfare against the United States were deemed to constitute acts in and an integral part of the crime where the elements that constitute treason were present. In ruling that

treason could be committed by an American citizen while residing in an enemy country, the Court maintained that the usual presumption against extraterritorial application of the criminal law did not apply to treason since the act of aiding the enemy "not unnaturally attaches to the enemy wherever it is", and, moreover, that the overt act could be committed outside the United States by virtue of the words "within the United States or elsewhere" contained in the treason statute itself (I Stat. 112 [1790]).

On an issue of first impression, the Court upheld on the basis of a "common-sense view of the situation" the introduction of substantial portions of evidence by way of electrical transcriptions heard by the jury through private earphones which were also supplied to the press and a limited number of spectators. Pointing out that the earphones were used as a matter of convenience and expediency, the Court ruled that appellant was not thereby deprived of a public trial in violation of the Sixth Amendment. Neither was the use in evidence of recordings made by appellant deemed to violate the Fifth Amendment's prohibition against self-incrimination, there being no compulsion upon the accused in the introduction of this evidence.

In dealing with the question raised as to the competency and credibility of certain witnesses, the Court, while reading the District of Columbia Code (Tit. 14, § 101) as formerly limiting the right to testify on affirmation to one who believes in God but does not believe in oath-taking in court, nevertheless approved permitting a witness who did not believe in the "God of the Bible" to testify on affirmation. It was explained that the Code must now be read with Rule 26 of the Federal Rules of Criminal Procedure providing that the competency of witnesses shall be governed by the principles of the common law as interpreted "in the light of reason and experience"; this, the Court stated, "brings into the area of competence witnesses who were under disability under the older criteria". In other phases of the case, the Court took the position that appellant was not immune from prosecution by reason of the alleged retention of her American passport by a consular agent in Germany or the signing of a letter purportedly swearing allegiance to Germany, since neither action was deemed sufficient to bring about expatriation; and that the federal district court had jurisdiction to try appellant notwithstanding the fact that she was brought against her will into the District of Columbia from Germany, since the right to arrest of the Army of Occupation was a part of the right to govern.

Habeas Corpus . . . extradition . . . Georgia fugitive's *habeas corpus* petition in federal district court for District of Columbia tests only the validity of arrest and detention by asylum state for extradition purposes and does not test validity of the original or contemplated incarceration in demanding state.

■ *Johnson* v. *Matthews,* C.A.,D.C., May 1, 1950, Prettyman, C. J.

This case is comparable on the facts, and opposed in result, to *Johnson* v. *Dye,* 175 F. (2d) 250 (C.A. 3d 1949), 35 A.B.A.J. 849, October, 1949, 36 A.B.A.J. 61, January, 1950. Petition for a writ of *habeas corpus* was brought in a federal district court—in this case, in the District of Columbia; in the *Johnson* v. *Dye* case, in Pennsylvania—by a fugitive from Georgia justice being detained locally for extradition.

The majority in the instant case held that *habeas corpus* could test only the validity of the arrest and detention by the authorities of the asylum state for extradition purposes, and could not put in issue the accused's chances of fair trial, constitutional punishment and preservation of civil rights in the extraditing state, despite allegations in the petition of prolonged detention without trial, "cruel, barbaric and inhuman treatment", and deprivation of constitutional rights prior to his escape from Georgia. It was pointed out that to permit state or federal courts in the asylum state to review the merits of petitioner's actual or probable treatment in the state of extradition involved the assumption that the courts might not protect the prisoner, and opened the way to a "patchwork of return or no return" decisions involving the various jurisdictions.

Bazelon, C. J., dissenting, maintained that the majority rested its conclusion in large part on the availability of the Georgia state and federal courts to protect petitioner, and thus raised "what is merely a presumption—that the law will follow its ordinary course and that officials will act properly—to the level of a conclusive rule of law". He suggested the possibility that the prisoner might not survive the anticipated mistreatment long enough to invoke the courts in Georgia. In his opinion the courts of the asylum state should "treat the regularity of official action as a rebuttable presumption to be tested in the light of facts, rather than by speculation within the bare frame of pleadings". Bazelon, C. J., and the majority also differed in their readings of the United States Supreme Court's reversal (338 U.S. 864) of *Johnson* v. *Dye,* without opinion or argument, upon a single reference, *Ex parte Hawk,* 321 U.S. 114 (1944). According to the majority, this meant that the Supreme Court had directed the *Johnson* petitioner to exhaust his remedies in the Georgia courts; according to Bazelon, C. J., the Supreme Court had directed him to do so in the Pennsylvania state courts.

Insurance . . . automobile liability insurance . . . California Assigned Risk Law held constitutional.

■ *California State Automobile Assn. Inter-Insurance Bureau* v. *Downey,* Calif. Dist. Ct. App., April 10, 1950, Peters, P. J. (Digested in 18 U.S. Law Week 2503, May 9, 1950).

The Court held in this action that the California Assigned Risk Law (Ins. Code, §§ 11620-11627), providing for the proportionate assignment to all licensed liability insurers of those applicants for automobile liability insurance who were in good

faith entitled to but were unable to procure such insurance "through ordinary methods", did not violate the due process clause of the Fourteenth Amendment of the Federal Constitution. Enacted to correct the inequities created by the state's financial responsibility laws requiring insurance or security from certain automobile drivers, the Assigned Risk Law was deemed to bear a reasonable relation to the legislative purpose of making liability insurance available to applicants (considered by insurance companies to be "bad" financial risks) whose livelihood was often jeopardized and whose right to use the highways limited by their inability to procure insurance. In dealing with the contention that insurance companies could not be so compelled to "dedicate their property to the public" and to enter into contracts against their will, the Court maintained that, although the statute in effect prohibited a liability insurance company from limiting itself to the most profitable risks by requiring it to accept a share of those less profitable and thereby infringed on its freedom to contract, such infringement was justifiable since the insurance business was one affected with a public interest and hence subject to "reasonable" legislative regulation. Further, the Court ruled, although an insurance company could not be compelled to assume a risk, its license to do business could be terminated under the police power if it refused to accept an assigned risk. As for the claim that the statute was invalid as applied to appellant in compelling it to accept nonmember risks when it had theretofore limited its policies to members of the California State Automobile Association, the Court pointed out that despite its restrictive practice appellant had the legal right to write automobile liability insurance on a state-wide basis and for all applicants. The Court rejected appellant's contention that there had been an unconstitutional delegation of legislative power to the commissioner by the provision of the statute that made him free to determine what types of applicants insurers would be compelled to insure and what types they might refuse. It was said that the statute, in declaring that it was the policy of the law to allow the commissioner to issue a plan for the equitable apportionment of applicants in good faith entitled to insurance, furnished, when considered in connection with its object and background, a constitutional yardstick.

Labor Law . . . refusal to bargain . . . employer's refusal during 1949 contract negotiations to furnish union with names, positions and current wage rates of employees, while insisting upon renewal of 1948 contract, constitutes refusal to bargain in violation of § 8 (a) (5) and (1) of Labor-Management Relations Act.

■ *In re Yawman & Erbe Manufacturing Co.*, Case No. 3-CA-171, NLRB, April 28, 1950.

The Board held in this decision that respondent employer's refusal, in connection with negotiations for a 1949 contract, to furnish the union with the names, positions and current wage rates of employees within the unit, while insisting upon the renewal of the prior year's contract without change, constituted a refusal to bargain in violation of § 8 (a) (5) and (1) of the Labor Management Relations Act. The Board ruled that the wage information sought by the union for the year 1948 was clearly relevant to the 1949 wage negotiations and a disclosure of such wages was necessary to enable the union to "bargain intelligently". Otherwise, the Board stated, the union would be placed in the position of dealing *in vacuo* on subjects relating to wages "as there existed no area known to the union in which it could vary its wage position". The Board found no obligation on the part of the employer, however, to furnish wage data for 1946 and 1947, and reversed the trial examiner's finding that the refusal to furnish such information for those years constituted a part of the refusal to bargain.

Member Murdock, dissenting in part, maintained that the union was also entitled to the 1946 and 1947 information even though the record did not disclose the specific purpose for which the information was to be used.

(See also *In re B.F. Goodrich Co.*, Case No. 8-CA-209, May 5, 1950, in which the Board ruled that the employer's refusal during collective bargaining negotiations concerning salary ranges to furnish the names of employees in such form as to identify individual employees specifically with their jobs as listed in the data tendered to the union concerning job content, salaries and merit ratings constituted a refusal to bargain in violation of § 8 (a) (5) and (1) of the Labor Management Relations Act.)

Libel and Slander . . . privilege . . . newspaper's publication of defamatory articles based on information obtained from motions and affidavits filed in a separation action is not privileged under § 337 of New York Civil Practice Act as a true report of a judicial proceeding, since Rule 278 of Rules of Civil Practice bars public inspection of papers filed in matrimonial actions.

■ *Stevenson* v. *News Syndicate Co., Inc.*, N.Y. Sup. Ct., App. Div., 2d Dept., April 24, 1950, Johnston, J.

In a libel suit alleging damage to plaintiff's good name and reputation caused by defendant's publication of defamatory newspaper articles concerning plaintiff on the basis of information obtained from motions and affidavits filed in the office of the county clerk in an action for separation commenced by plaintiff's wife, defendant set up the affirmative defense that the publication was privileged under § 337 of the New York Civil Practice Act as a "fair and true report of any judicial, legislative or other public and official proceedings. . . ." The lower court denied motions by both plaintiff and defendant for judgment on the pleadings.

Affirming the orders below, Johnston, J., writing for the majority of the Court, held that the statutory privilege was limited to reports of papers in judicial proceedings that were open to public inspection, and hence, since under Rule 278 of the Rules of Civil Practice papers filed in

a matrimonial action are sealed and not open to public inspection, the privilege could not be claimed by defendant newspaper. Since § 337 did not purport to define the proceedings that were public, the Court found no conflict between the privilege accorded by that section and the limitation contained in Rule 278. Favoring a strict construction of the statute, the Court stated that it was not intended to enlarge the class of privileged communications as they existed at common law. The Court distinguished *Campbell* v. *New York Evening Post*, 245 N.Y. 320, on the ground that the court there ruled merely that the privilege which always attached to judicial proceedings taking place in open court also applied to papers filed in the course of those judicial proceedings to which the public had the right of access.

Sneed, J., with whom Wenzel, J., concurred, concurring for affirmance of the order denying plaintiff's motion but dissenting as to the order denying defendant's motion, maintained that the articles published were reports of a judicial proceeding within the meaning of § 337, and that Rule 278 was not intended to and did not abridge the absolute privilege provided in that section.

Municipal Corporations . . . water supply . . . vacation resort owners cannot enjoin New York City's artificial rain-making experiments.

■ *Slutsky* v. *City of New York, N.Y.* Supreme Ct., Spec. Term, Pt. III, N. Y. City, May 11, 1950, Pecora, J.

In an action by the owners of an all-year-round vacation resort to enjoin New York City from engaging in artificial rain-making experiments, plaintiffs contended, *inter alia*, that the effect of actual or threatened rainfall would be deleterious to the resort business since a moderate and desirable climate was an important factor in the success of such business. Denying the motion, the Court held that, in view of the serious water emergency confronting New York City, the relief requested was opposed to the public welfare. Balancing the conflicting interests between what was considered a "remote possibility of inconvenience" to plaintiffs' resort and its guests and the problem of maintaining and supplying the inhabitants of New York City and surrounding areas with an adequate amount of water, the Court stated that it would not protect a possible private injury at the expense of a positive public advantage. The Court found that the dangers to the resort business apprehended by plaintiffs were "purely speculative". Further, the Court maintained, there was no legal basis shown for the relief sought since plaintiffs had no vested property rights in the clouds or the moisture therein.

Sales . . . warranty of quantity . . . warranty against excess outage of whiskey retained in seller's warehouse held enforceable by subpurchaser.

■ *Hunter-Wilson Distilling Co., Inc.* v. *Foust Distilling Co.*, C.A. 3d, April 21, 1950, McLaughlin, C. J. (Digested in 18 U.S. Law Week 2492, May 2, 1950).

In 1940, appellee sold to Wilson Company 2535 barrels of rye whiskey which appellee continued to store in its warehouse under warehouse receipts. In a separate document, appellee gave a warranty covering excess outage (*i.e.*, loss of contents in excess of that allowed by the Government for tax computation purposes.) Thereafter Wilson sold and assigned all its assets to appellant without specific reference to the warranty. After subsequent regauging showed excess outage, appellant sued for breach of warranty. Judgment in favor of appellee was reversed on appeal.

The Court found that it was the intention of the parties that the warranty was to be transferred with Wilson's other assets, but was unable to find a Pennsylvania state court decision governing the enforceability by a subpurchaser of a warranty of quantity. The trend of the Pennsylvania cases was said, however, to indicate relaxation of "the old sacrosanct common law doctrine of privity between the original seller and the subpurchaser". Support for the assignability of the instant warranty of quantity was found in *Restatement, Contracts*, § 151, there being neither law nor contract proviso forbidding assignment, and the assignment not varying materially the appellee's duty as distiller-warehouseman. Moreover, the Court said: "We think appellee assumed the duty of making good excess outage during its retention of the whiskey. If restriction of that responsibility to the original purchaser had been desired, it could have been so stated in the warranty." The case was remanded for assessment of damages.

Kalodner, C. J., dissenting, maintained that the law of warranty did not permit assignment. He also pointed out that the case could have been deemed equally well governed by the declaration in the warehouse receipts that appellee would not be responsible for loss from specified causes "or other causes beyond our control", and that the court below had not found that the separate letter containing, *inter alia*, the warranty was intended to cancel the clause in the warehouse receipts, or that the general assignment by Wilson to appellant was intended to include the warranty. Accordingly, he contended, the majority should have remanded for further findings.

Shipping . . . freight forwarders . . . rules issued by United States Maritime Commission governing business practices of freight forwarders.

■ Code of Federal Regulations, Tit. 46, Ch. II, Pt. 244, §§ 244.1–244.15 (15 Fed. Reg. 3152).

Publication is made in the *Federal Register* of May 24, 1950, of rules newly issued by the Maritime Commission governing the business practices of freight forwarders. Effective as of June 1, 1950, these rules require that all persons who engage in the business of forwarding must register with the Commission, existing firms within sixty days and new firms before engaging in business. Included in the definition of a freight forwarder are independent freight forwarders, common carriers, manufac-

turers, exporters, export traders, manufacturers' agents, resident buyers, commission merchants, and other persons when they engage for and on behalf of any person other than themselves, in return for a consideration, in the business of dispatching shipments by ocean-going vessels in commerce from the United States, its territories or possessions to foreign countries, or between the United States and its territories or possessions, or between such territories and possessions, and of handling the formalities incident to such shipments. Registered forwarders will receive a registration number that must be used on letterheads, invoices, advertising and other documents. Registration may be suspended or cancelled after notice and hearing for violations of this part of the Shipping Act, 1916.

The rules cover such additional matters as registration lists, billing practices, consolidated shipments, special contracts, exceptions as to special contracts, nondiscriminatory treatment, forwarders' receipts and brokerage.

United States . . . Federal Tort Claims Act . . . property loss resulting from Government's development of Missouri River for waterway transportation is not actionable under Act since acts complained of were deemed to be within the "discretionary function" exception of the Act.

■ *Coates* v. *U.S.*, C.A. 8th, May 4, 1950, Woodrough, C. J.

Appellant property owners sued under the Federal Tort Claims Act to recover for the flooding and destruction of their farm and crops alleged to have resulted from the Government's "negligently changing the Missouri River" by substantially changing "its flow, current, banks and course" in the Government's development of the river for waterway transportation. The District Court granted the Government's motion to dismiss the complaint on the ground that the acts complained of were within the "discretionary function" exception of the Act and hence were not within the court's jurisdiction. The order of dismissal was sustained on appeal.

The Tort Claims Act specifically exempts from the scope of its provisions claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency . . . whether or not the discretion involved is abused" (28 USC § 2680 [a]). The Court ruled that the changing of the Missouri River under legislative and executive sanction pursuant to political and discretionary decisions of the highest governmental order manifestly involved the exercise and performance of discretionary functions within the exception of the Act, and was entirely beyond any power of interference by the judicial branch. The Court refused to read the complaint "as though it charged negligence in the changing of the river in respect to some mere job of work involved in carrying on the river project and not in the exercise of legislative and executive functions which sanction it and the performance of discretionary functions which control it."

United States . . . Federal Tort Claims Act . . . where discretion was already exercised by hospital authorities in admitting serviceman's wife to Army hospital, her claim for injuries received as result of negligent treatment by Army medical personnel is not "based on exercise of discretionary function" within exemption to Act and hence Government is liable for such injuries.

■ *Costley* v. *U.S.*, C.A. 5th, May 5, 1950, Holmes, C. J.

Reversing the judgment below, the Court in this action permitted assertion under the Federal Tort Claims Act of an action involving negligent treatment by employees of an Army hospital in attending a serviceman's wife. Plaintiff wife was admitted to the hospital maternity section pursuant to Army Regulation No. 40-590 giving medical officers discretionary authority to admit to army hospitals servicemen's families "when suitable facilities for hospitalization are available". In rejecting the Government's contention that it was exempt from liability since the action complained of was based on the exercise of a "discretionary function" within the exemption to the Act contained in 28 USC § 2680 (a), the Court ruled that, having once exercised their discretion by admitting plaintiff into the hospital, the hospital authorities no longer had any discretion to exercise with regard to whether she was to receive careful or negligent treatment. It was deemed their duty at this point to treat her with the same care and diligence that would be owing by a private person or corporation under similar circumstances. The Court distinguished its own decision in *Denny* v. *U. S.* (*cert. den.* May 31, 1949), 171 F. (2d) 365, 35 A.B.A.J. 144, 585, February, July, 1949, holding that the Government was not liable under the Act where it was negligent in failing to provide prompt ambulance service and medical attendance to an Army officer's wife during childbirth, resulting in the stillbirth of the child. The *Denny* case was said to come within § 2c (3) of Army Regulation No. 40-505, which authorizes medical attendance of dependents "whenever practicable", whereas such a condition of practicability was deemed inapplicable in the case of the instant plaintiff who was entitled to receive medical attendance under the provisions of § 2a of Army Regulation No. 40-505 as a "person admitted to an Army hospital under the provisions of AR 40-590. . . ."

Further Proceedings in Cases Reported in This Division

■ AFFIRMED, May 8, 1950: *Building Service Employees International Union, Local 262* v. *Gazzam*—Labor Law (34 A.B.A.J. 240, March, 1948; 36 A.B.A.J. 141, February, 1950).

CERTIORARI GRANTED, May 8, 1950: *Griggs* v. *U. S.*—United States (36 A.B.A.J. 60, January, 1950).

CERTIORARI GRANTED, May 15, 1950: *Kristensen* v. *McGrath*—Aliens (36 A.B.A.J. 134, February, 1950).

PROBABLE JURISDICTION NOTED, May 29, 1950: *U.S.* v. *U.S. Gypsum Co.*—Sherman Act (32 A.B.A.J. 880, December, 1946; 33 A.B.A.J. 726, July, 1947; 34 A.B.A.J. 324, April, 1948).

CERTIORARI DENIED, May 15, 1950:

Lord Manufacturing Co. v. *U.S.*—Eminent Domain (35 A.B.A.J. 775, September, 1949).

APPEAL DISMISSED, May 29, 1950: *U.S. Gypsum Co.* v. *U.S.*—Sherman Act (32 A.B.A.J. 880, December, 1946; 33 A.B.A.J. 726, July, 1947; 34 A.B.A.J. 324, April, 1948).

■ The following action has been taken by the Maryland Court of Appeals (see review *supra*):

REVERSED, April 14, 1950: *McCready* v. *Byrd et al.*—Constitutional Law (35 A.B.A.J. 1017, December, 1949).

THE DEVELOPMENT OF INTERNATIONAL LAW

Louis B. Sohn • Editor-in-Charge

First International Covenant on Human Rights

■ After eight weeks of assiduous work, the Commission on Human Rights adopted on May 19, 1950, the "Draft First Covenant on Human Rights", and submitted it to the Economic and Social Council for consideration. If the Council approves this draft, it will submit it to the General Assembly, and the General Assembly will make the final decision whether to submit it to member governments for ratification. The text adopted by the Commission is not, therefore, the final text, but only a preliminary text which may be modified both by the Economic and Social Council and the General Assembly.

The text of the draft Covenant contains forty-five articles, fifteen of which deal with "fundamental rights of the individual" and "essential civil freedoms". The Commission postponed to a later session the consideration of additional provisions dealing with "economic, social, cultural, political and other categories of human rights".

Part III of the Covenant deals with measures of implementation. It contemplates the creation of a Human Rights Committee of seven members, elected from a special panel by parties to the Covenant. After all available domestic procedures and remedies have been exhausted, a state that considers that another state is not giving effect to a provision of the Covenant may refer the matter to the Committee. The Committee shall ascertain the facts and offer its good offices to the states concerned and, if a friendly solution is not reached, draw up its report in which it shall state its conclusions on facts. No further official action is contemplated, but it is hoped that the pressure of public opinion will make it difficult for states to disregard the conclusions of the Committee.

No agreement has been reached yet on Article 43 (relating to federal states) and on Article 44 (relating to non-self-governing territories), and the text of these articles must still be considered by the Economic and Social Council.

The text of the Covenant follows.

Draft First International Covenant on Human Rights

PART I

Preamble

The States Parties hereto,

Considering the obligation under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Bearing in mind the Universal Declaration of Human Rights,

Recognizing that the rights and freedoms recognized in this Covenant flow from the inherent dignity of the human person,

By this Covenant agree upon the following articles with respect to these rights and freedoms.

Article 1

1. Each State party hereto undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in this Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of this Covenant, to adopt within a reasonable time such legislative or other measures as may be necessary to give effect to the rights recognized in this Covenant.

3. Each State party hereto undertakes to ensure:

(*a*) That any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(*b*) That any person claiming such a remedy shall have his right thereto determined by competent authorities, political, administrative or judicial;

(*c*) That the competent authorities shall enforce such remedies when granted.

Article 2

1. In the case of a state of emergency officially proclaimed by the authorities or in the case of public disaster, a State may take measures derogating, to the extent strictly limited by the exigencies of the situation, from its obligations under Article 1, paragraph 1 and Part II of this Covenant.

2. No derogation from Articles 3, 4, 6 (paragraphs 1 and 2), 7, 11, 12 and 13 may be made under this provision. No derogation which is otherwise incompatible with international law may be made by a State under this provision.

3. Any State party hereto availing itself of the right of derogation shall inform immediately the other States parties to the Covenant, through the intermediary of the Secretary-General, of the provisions from which it has derogated and the date on which it has terminated such derogation.

PART II

Article 3

1. Everyone's right to life shall be protected by law.

2. To take life shall be a crime, save in the execution of a sentence of a court, or in self-defense, or in the case of enforcement measures authorized by the Charter.

3. In countries where capital punishment exists, sentence of death may be imposed only as a penalty for the most serious crimes, pursuant to the sentence of a competent court and in accordance with law not contrary to the Universal Declaration of Human Rights.

4. Anyone sentenced to death shall have the right to seek amnesty, or pardon, or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

Article 4

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected against his will to medical or scientific experimentation involving risk, where such is not required by his state of physical or mental health.

Article 5

1. No one shall be held in slavery; slavery and the slave trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3. (*a*) No one shall be required to perform forced or compulsory labour.

(*b*) The preceding sub-paragraph shall not be held to preclude, in countries where imprisonment with "hard labour" may be imposed as a punishment for a crime, the performance of "hard labour" in pursuance of a sentence to such punishment by a competent court.

(*c*) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, other than work performed in pursuance of a sentence of "hard labour" required to be done in the course of detention in consequence of a lawful order of a court;

(ii) Any service of a military character or, in the case of conscientious objectors, in countries where they are recognized, service exacted in virtue of laws requiring compulsory national service;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civic obligations.

Article 6

1. No one shall be subjected to arbitrary arrest or detention.

2. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

3. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

4. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. Pending trial, detention shall not be the general rule, but release may be subject to guarantees to appear for trial.

5. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided without delay by a court and his release ordered if the detention is not lawful.

6. Anyone who has been the victim of unlawful arrest or deprivation of liberty shall have an enforceable right to compensation.

Article 7

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 8

1. Subject to any general law, consistent with the rights recognized in this Covenant:

(*a*) Everyone legally within the territory of a State shall, within that territory, have the right to (1) liberty of movement and (2) freedom to choose his residence;

(*b*) Everyone shall be free to leave any country including his own.

2. (*a*) No one shall be subjected to arbitrary exile.

(*b*) Subject to the preceding sub-paragraph anyone shall be free to enter the country of which he is a national.

Article 9

No alien legally admitted to the territory of a State shall be expelled therefrom except on established legal grounds and according to procedure and safeguards which shall in all cases be provided by law.

Article 10

1. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing, by an independent and impartial tribunal established by law. The press and public may be excluded from all or part of a trial for reasons of morals, public order or national security, or where the interest of juveniles so requires or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice; but the judgment shall be pronounced publicly except where the interest of juveniles otherwise requires.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(*a*) To be informed promptly of the nature and cause of the accusation against him;

(*b*) To defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case where he does not have sufficient means to pay for it;

(*c*) To examine, or have examined, the witnesses against him and to obtain compulsory attendance of witnesses in his behalf who are within the jurisdiction and subject to the process of the tribunal;

(*d*) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(*e*) No one shall be compelled to testify against himself, or to confess guilt;

(*f*) In the case of juveniles, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

3. In any case where by a final decision a person has been convicted of a criminal offence and where subsequently a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated. This compensation shall be awarded to the heirs of a person executed by virtue of an erroneous sentence.

Article 11

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

2. Nothing in this Article shall prejudice the trial and punishment of any person for the commission of any act which, at the time when it was committed, was criminal according to the generally recognized principles of law.

Article 12

Everyone shall have the right to recognition everywhere as a person before the law.

Article 13

1. Everyone shall have the right to freedom of thought, conscience and religion; this right shall include freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are pursuant to law and are reasonable and necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Article 14

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The right to seek, receive and impart information and ideas carries with it special duties and responsibilities and may therefore be subject to certain penalties, liabilities and restrictions, but these shall be such only as are provided by law and are necessary for the protection of national security, public order, safety, health or morals, or of the rights, freedoms or reputations of others.

Article 15

The right of peaceful assembly shall be recognized. No restrictions shall be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary to ensure national security, public order, the protection of health or morals or the protection of the rights and freedoms of others.

Article 16

1. The right of association shall be recognized.

2. No restrictions shall be placed on the exercise of this right other than those prescribed by law and which are necessary to ensure national security, public order, the protection of health or morals or the protection of the rights and freedoms of others.

3. Nothing in this article shall authorize States parties to the Freedom of Association and Protection of the Right to Organize Convention, to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 17

All are equal before the law: all shall be accorded equal protection of the law without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 18

1. Nothing in this Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in this Covenant.

2. Nothing in this Covenant may be interpreted as limiting or derogating from any of the rights and freedoms which may be guaranteed under the laws of any Contracting State or any conventions to which it is a party.

PART III

Article 19

1. With a view to the implementation of the provisions of the International Covenant on Human Rights, there shall be set up a Human Rights Committee, hereinafter referred to as "the Committee", composed of seven members with the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States Parties to the Covenant who shall be persons of high standing and of recognized experience in the field of human rights.

Article 20

1. The members of the Committee shall be elected from a list of persons possessing the qualifications prescribed in Article 19 and specially nominated for that purpose by the States Parties to the Covenant.

2. Each State shall nominate at least two and not more than four persons. These persons may be nationals of the nominating State or of any other State party to the Covenant.

3. Nominations shall remain valid until new nominations are made for the purpose of the next election under Article 25. A person shall be eligible to be renominated.

Article 21

At least three months before the date of each election to the Committee, the Secretary-General of the United Nations shall address a written request to the States parties to the Covenant inviting them, if they have not already submitted their nominations, to submit them within two months.

Article 22

The Secretary-General of the United Nations shall prepare a panel of the persons thus nominated, and submit it to the States parties to the Covenant.

Article 23

The Committee shall be elected from the panel provided for in Article 22 by the States parties to the Covenant, who shall send representatives to a meeting convened by the Secretary-General for the purpose of such elections. No more than one national of any State may be a member of the Committee at any time. In the election of the Committee consideration shall be given to equitable geographical distribution of membership.

Article 24

The Secretary-General of the United Nations shall make the arrangements for, and fix the time of, elections. The members of the Committee shall be elected by a majority vote of the representatives of the States parties to this Covenant present and voting. A quorum for such election shall consist of two thirds of the States parties to the Covenant.

Article 25

The members of the Committee shall be elected for a term of five years and be eligible for re-election. However, the terms of four of the members elected at the first election shall expire at the end of two years. Immediately after the first election the names of the members whose terms expire at the end of the initial period of two years shall be chosen by lot by the Secretary-General of the United Nations.

Article 26

1. Vacancies shall be filled by election and articles 21, 22, 23 and 24 shall apply.

2. A member of the Committee elected to fill a vacancy shall, if his predecessor's term of office has not expired, hold office for the remainder of that term.

Article 27

A member of the Committee shall remain in office until his successor has been elected; but if the Committee has, prior to the election of his successor, begun to consider a case, he shall continue to act in that case, and his successor shall not act in that case.

Article 28

The resignation of a member of the Committee shall be addressed to the Chairman of the Committee through the Secretary of the Committee who shall immediately notify the Secretary-General of the United Nations.

Article 29

The members of the Committee, when engaged on the business of the Committee, shall enjoy diplomatic privileges and immunities.

Article 30

The Secretary and the Assistant Secretary of the Committee shall be appointed by the Secretary-General of the United Nations, with the approval of the Committee.

Article 31

The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquar-

ters of the United Nations.

Article 32

1. The Committee shall, at its initial meeting, elect its Chairman and Vice-Chairman for the period of one year and consider the rules of procedure to be established in accordance with Article 33.

2. Thereafter the holding of these offices shall rotate among the members of the Committee in accordance with arrangements prescribed by the rules of procedure.

Article 33

The Committee shall establish its own rules of procedure, but these rules shall provide that:

(*a*) Five members shall constitute a quorum;

(*b*) The work of the Committee shall proceed by a majority vote of the members present; in the event of an equality of votes the Chairman shall have a casting vote;

(*c*) The States referred to in Article 38 shall have the right to be represented at the hearings of the Committee and to make submissions to it orally and in writing;

(*d*) The Committee shall hold hearings and other meetings in closed session.

Article 34

1. A State Party to the Covenant concerned in a case referred to the Committee may, if none of its nationals is a member of the Committee, designate as a member, to participate with the right to vote in the deliberations on the case under consideration, a person chosen from the list referred to in Article 20.

2. Should there be several States in the same interest, they shall, for the purpose of the preceding sentence, be reckoned as one only. Any doubt upon this point shall be settled by the Committee.

Article 35

1. After its initial meeting the Committee shall meet at such times as it deems necessary, and shall be convened by its Chairman or at the request of not less than four of its members and in any event when a matter is referred to it under Article 38.

2. The Committee shall meet at the Permanent Headquarters of the United Nations or at Geneva.

Article 36

The Secretary of the Committee shall attend its meetings and, under the instructions of the Committee, shall make all necessary arrangements for the preparation and conduct of the work of the Committee.

Article 37

The Secretary-General of the United Nations shall provide the necessary services and facilities for the Committee and its members.

Article 38

1. If a State Party to the Covenant considers that another State Party is not giving effect to a provision of the Covenant, it may, by written communication, bring the matter to the attention of that State. Within three months after the receipt of the communication, the receiving State shall afford the communicating State an explanation or statement in writing concerning the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, or pending, or available in the matter.

2. If the matter is not adjusted to the satisfaction of both parties within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Secretary of the Committee and to the other State.

Article 39

Normally, the Committee shall deal with a matter referred to it only if available domestic remedies have been invoked and exhausted in the case. This shall not be the rule where the application of the remedies is unreasonably prolonged.

Article 40

In any matter referred to it, the Committee may call upon the States concerned to supply any relevant information.

Article 41

1. Subject to the provisions of Article 39, the Committee shall ascertain the facts and make available its good offices to the States concerned with a view to a friendly solution of the matter on the basis of respect for human rights as recognized in this Covenant.

2. The Committee shall, in every case and in no event later than eighteen months after the date of receipt of the notice under Article 38, draw up a report which will be sent to the States concerned and then communicated to the Secretary-General of the United Nations for publication.

3. If a solution within the terms of paragraph 1 of this article is reached the Committee shall confine its report to a brief statement of the facts and of the solution reached. If such a solution is not reached, the Committee shall state in its report its conclusions on the facts.

PART IV

Article 42

1. This Covenant shall be open for signature and ratification or accession on behalf of any State Member of the United Nations or of any non-member State to which an invitation has been extended by the General Assembly.

2. Ratification of or accession to this Covenant shall be effected by the deposit of an instrument of ratification or accession with the Secretary-General of the United Nations, and as soon as twenty States have deposited such instruments, the Covenant shall come into force among them. As regards any State which ratifies or accedes thereafter the Covenant shall come into force on the date of the deposit of its instrument of ratification or accession.

3. The Secretary-General of the United Nations shall inform all Members of the United Nations, and other States which have signed or acceded, of the deposit of each instrument of ratification or accession.

Article 43

(Federal States)

[The Commission decided to transmit this article, together with comments and amendments thereto, to the Economic and Social Council for its consideration, without discussing the article.]

* * *

Article 44

(Non-self-governing Territories)

[The Commission decided to transmit this article, together with comments and amendments thereto, to the Economic and Social Council for its consideration, without discussing the article.]

* * *

Article 45

1. Any State Party to the Covenant may propose an amendment and file it with the Secretary-General. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to the Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that at least one-third of the States favour such a conference the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States present and voting at the conference shall be submitted to the General Assembly for approval.

2. Such amendments shall come into force when they have been approved by the General Assembly and accepted by a two-thirds majority of the States parties to the Covenant in accordance with their respective constitutional processes.

3. When such amendments come into force they shall be binding on those parties which have accepted them, other parties being still bound by the provisions of the Covenant and any earlier amendment which they have accepted.

Department of Legislation

Harry W. Jones, Editor-in-Charge

■ The author of this article, Joseph S. Platt of the Ohio Bar, is Chairman of the Committee on Publications of the Section of Taxation of the American Bar Association. Mr. Platt's informative comments on current developments in the field of tax law are well known to readers of the *Journal's* "Tax Notes" section, which is prepared by the Committee on Publications. Mr. Platt's discussion here is of professional interest and value both as an analysis of the pending Tax Revision Bill and as a general description and evaluation of the procedures followed by the Section of Taxation in the development and presentation of its legislative recommendations.

The American Bar Association's Tax Revision Bill

By Joseph S. Platt

■ The American Bar Association has a special interest in H. R. 7738 and H. R. 7825 presently pending in the House Ways and Means Committee. This is our own tax revision bill. It was introduced on March 16 and 23 (in the form of two identical bills) by two members of the Committee, Representatives A. Sidney Camp of Georgia and Daniel A. Reed of New York. The bill embodies all the Association's outstanding proposals for changes in the Internal Revenue Code, eighty-four in number.

There has been no general tax revision since 1942. During the intervening years and particularly since the war, the Section of Taxation, by authority of the House of Delegates, has submitted to Congress a large number of recommendations for revision of the revenue laws. Some have been enacted into law—the "husband and wife" amendments of 1948, the statute overruling the *Dobson* decision (320 U. S. 489) on review of Tax Court decisions, the legislative overruling of the *Church* and *Spiegel* (335 U. S. 701) cases, and several others. H. R. 7738 and 7825 gather together all our recommendations of the past several years that have not been adopted by Congress.

The bill includes many highly technical provisions, of interest only to the specialist. But it also covers a great many matters of general interest. Here are a few examples.

Section 104—Deductibility of contributions to union welfare trusts established under the Taft-Hartley Act.

Section 110—Deductibility of alimony paid under separation agreement in absence of court decree.

Section 113—Permitting taxpayer to change his election to take the standard deduction at any time within the period of limitations.

Section 129—Redemption of corporate stock held by a decedent's estate to raise money for estate taxes.

Section 137—Taxation of income of estates and trusts.

Section 139—Six-year statute of limitations in case of nonfraudulent failure to file return.

Section 148—Family partnerships.

Section 153—Nonrecognition of gain in connection with exchange of taxpayer's residence for a new one, or sale with reinvestment of proceeds.

Section 154—Employees' stock options.

Section 203—Elimination of premium test for estate taxation of life insurance proceeds.

Section 204—Transfers in contemplation of death.

Sections 213 and 252—Requirement for recording of estate and gift tax liens.

Sections 214 and 256—Powers of appointment.

Section 402—Creating a small claims branch of the Tax Court.

Some of the sections of this bill are of particular interest to lawyers as such. Section 120, for example, would amend Code Section 107 to permit averaging of income (*e.g.*, legal fees) where the work to date has extended over a period of thirty-six months and at least 80 per cent of the amount received to date was collected in the current taxable year. The present statute applies only where the work has been completed. Section 152 deals with partnership income paid after death to the estate or widow of a deceased partner. The amendment would make sure that this income is taxed to the recipient. And Section 210 makes it clear that legal fees incurred in estate tax litigation may be taken into account in the final tax determination.

Generally speaking, the recommendations of the Tax Section may be classified into three groups: (1) those dealing with procedural matters—determination of deficiencies, refunds, statutes of limitations and the like; (2) those intended to clear up uncertainties in the existing law and to eliminate provisions that have proved to be breeders of litigation; and (3) (most important) those designed to correct inequities in the existing law—provisions that discriminate against one group of taxpayers in favor of another group similarly situated.

As a matter of policy the Section does not concern itself with matters of substantive tax law—whether and to what extent a particular type of income should be taxed or a deduction or exemption allowed. The line between substantive matters and provisions that operate in an inequitable manner is often hard to draw. The Section is conscious of this problem and has generally resolved any doubts in favor of self-restraint. It has consistently attempted, in other words, to stay within the area where the tax Bar has a special competence.

The Section of Taxation is composed of lawyers who represent taxpayers and it is inevitable that their

recommendations should be concerned primarily with the protection of taxpayers in the exercise of their rights and against the uneven impact of the tax laws. It is interesting therefore that H. R. 7738 and 7825 include a number of provisions designed to close loopholes in the existing law: see for example, Section 114 disallowing a deduction for wages paid to a person claimed by the taxpayer as a dependent; and Sections 130 and 131 designed to prevent the conversion of ordinary income to capital gain by means that are wholly artificial and unjustified.

The evolution of this bill has been a long and arduous process. The spade work has been done in the many committees of the Section. At the present time there are twenty active committees dealing with the federal tax laws and procedure thereunder, each concerned with a separate subject matter. They vary in size from seven to fifty-two members. The Committee on Taxation of Corporations, for example, has a membership of thirty-one and functions through several subcommittees.

A legislative proposal is considered first by the appropriate committee and, if the change is deemed desirable, a preliminary draft statute is prepared. The proposal is then submitted informally to the Council of the Section. Members of the Council and committee chairmen usually meet together twice during the year for this purpose in addition to the general meeting in September. Such meetings were held this year in January and May. At these meetings the proposal is carefully analyzed and its purpose and effect thoroughly explored. Many proposals are dropped at this stage.

All legislative proposals are also submitted to the Committee on Legislative Drafting where they are examined and revised by experienced draftsmen in order that the finished product may be integrated with the Code and appropriate for congressional action.

Throughout this process the committee chairman is usually in touch with the Tax Legislative Counsel and other Treasury officials and often with the staff of the congressional Joint Committee on Internal Revenue Taxation. Both groups have been extremely helpful to the Section and it has frequently been possible to work out proposals that have the approval of the Treasury as well as the tax Bar.

All committee proposals are given a further going over by the Council a day or two prior to the Annual Meeting. The final recommendation is then submitted to the Section membership at the Annual Meeting for approval or rejection. In all these preliminary stages the action of the Council is advisory only and, although its advice is ordinarily followed, the committees are free to carry their proposals to the Section membership without Council approval.

Legislative recommendations that have survived this screening process and been approved by the Section are submitted by the Section Chairman to the House of Delegates with a concise explanatory report. The House of Delegates is well aware of the painstaking consideration and analysis to which these proposals have been subjected, and has, almost without exception, approved the Section of Taxation's recommendations.

Such is the background of H. R. 7738-7825. In introducing the bill on March 16, Representative Camp said:

> I feel that the views of these distinguished lawyers are worthy of our most serious thought and study. . . .

And on March 23 Representative Reed commented as follows:

> The Tax Section of the American Bar Association deserves the highest praise for its constructive work in this field. These lawyers have devoted themselves unselfishly to this task, not in the interest of their clients but in the general public interest of making our tax laws equitable in their application and better in their administration. . . . These highly meritorious recommendations deserve the most careful consideration, and favorable action should be taken by the Congress without delay.

"Books for Lawyers"
(Continued from page 566)

internal danger to America's political institutions as the cult of nudists does to the clothing industry." The editors wisely sought to temper such outbursts by asking Professor Sutherland of the Cornell Law School to append his thoughts on the problem. He reminds us that we are facing an emergency and that even though some cases may present deplorable factors, nevertheless, the problems facing us must be met. "No one suggests abolishing police because they are sometimes stupid or brutal; the remedy is to improve the police."

Don K. Price speaks in favor of the Hoover recommendations for strengthening the presidency and Edgar Ansel Mowrer of the *Chicago Daily News* concludes the volume with much caustic and critical comment about the formulation of American foreign policy. He finds President Truman's conduct of foreign affairs faulty as to scope and as to execution. He would have the President exercise the power of our nation in seeking the substitution of law for arbitrary international violence. "Here—as I see it—lies an unequaled opportunity for American leadership. If I believed in specific historical destinies, I would insist that just for this was the United States of America created." Such are among the provocative comments that abound in this little volume.

LESTER E. DENONN
New York, New York

Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

Law Teachers Are Members of Bar

■ You undoubtedly did not intend a slur on the teaching profession when you stated in your editorial of May, 1950, "Law School professors more often than not have never been admitted to the Bar", but your readers might like to have the benefit of the following correct statistics.

Of the 1240 full-time faculty members in the 105 schools approved by the Association of American Law Schools for the academic year 1949-1950, only sixty-five professors or approximately 5 per cent have not as yet been admitted to the Bar. Of the 1175 admitted to the Bar, 261 professors are members of more than one Bar, some of whom practiced in as many as five different states. Included among the sixty-five who do not belong to any Bar are a large number of accountants, priests and professors of history, economics and sociology who add luster to the teaching of law, in addition to a few youngsters who began their teaching immediately upon graduation from law school and have not as yet had time to take the Bar examination.

Experience has also proved time and time again that there is no necessary correlation between success at the Bar and brilliance in the classroom. Some of our best teachers of law have never seen a client in their entire professional life.

KENNETH R. REDDEN

University of Virginia
Charlottesville, Virginia

Comments on Mr. Lutz's Article

■ Upon reading Karl Lutz's article on the general welfare clause in the March issue of the AMERICAN BAR ASSOCIATION JOURNAL (36 A.B.A.J. 196), I was rather startled and, I must admit, fascinated at the picture of an otherwise rational successful practicing attorney advocating a retreat from the "extreme" position supported by Justices Roberts, Hughes, Sutherland, Van Devanter, McReynolds and Butler, which allegedly is leading us "down the path to autocracy". I'm sure the spirit of that doughty "radical", Justice McReynolds must be having a wry chuckle to himself. For it was these esteemed members of the Supreme Court who, in the case of *United States* v. *Butler,* adopted the full Hamilton view that the power of Congress to tax and appropriate is limited only by the requirement that it shall be exercised to provide for the general welfare, while dodging the question as to the exact scope of the phrase "general welfare". The "altered" Supreme Court in *Helvering* v. *Davis,* a decision joined in by Justices Sutherland, Van Devanter and Hughes, reiterated this approval of the Hamilton view and attempted to show how the line between the general and the particular welfare might be drawn. The Court there did not, as contended by Mr. Lutz, say that "Congress is the *sole* judge of what constitutes the general welfare". As pointed out by Oscar Ewing in the same issue of the JOURNAL, the Court did say that there is a middle ground between the general and the particular in which discretion is large. "The discretion" said the Court "belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." The criteria laid down do not authorize a welfare state. Where the problem is "plainly national in area and dimensions" and "laws of the separate states cannot deal with it effectively", lacking the necessary financial resources, general welfare is in issue. Even the most myopic observer must admit that this test was met in the *Helvering* case, which concerned the Social Security Act.

The interpretation suggested by Mr. Lutz, which would limit national action to (1) the purchase of additional territory—a useful activity that our neighbors will certainly appreciate, (2) the leasing of military bases in foreign territory—which strangely sounds like providing for the "common defense", and (3) cooperation with international organizations, might not turn the calendar back to 1800. Mr. Lutz sagely admits it is too late for that. However, such an interpretation would certainly advance us little beyond the good old days of McKinley and Taft; we should be safe from the "dangerous ideas" of the pre-Roosevelt Supreme Court of the early thirties.

W. PERRY NORBERG
Burlingame, California

Flaw in War Trials Was Use of Affidavits

■ Paul Spurlock, in his article on the Yokohama War Crimes Trials [36 A.B.A.J. 387; May, 1950], makes the statement that he is amazed at the misconceptions of his brother lawyers concerning the trial of war criminals in Yokohama. In his article Mr. Spurlock should find the reason for the existence of these misconceptions. He says: "The defense contested the introduction of affidavits but was overruled . . . It was necessary to use affidavit evidence because. . . ."

I think many lawyers felt that

punishment was due for war crimes committed. However, proceedings in which the guilt or innocence of defendants on trial for life or liberty is determined by affidavits are hardly in accord with the principles on which our judicial system is founded.

FRANKLIN D. HEPBURN

Detroit, Michigan

An Insurance Man Questions Davis' Article

■ In my opinion the article in the April issue of the AMERICAN BAR ASSOCIATION JOURNAL should have been edited by someone of experience in the application of loss treatment under the provisions of fire insurance policies. A number of lawyers as well as insurance men have expressed surprise that the AMERICAN BAR ASSOCIATION JOURNAL permitted the publication of the article without having it checked thoroughly by someone capable of pointing out certain incorrect statements as well as inadvisable implications.

The article has been discussed with two large country-wide *company*-operated adjusting organizations who report that the appraiser-umpire method is rarely used because the necessity seldom arises. Usually this circumstance is caused by a recalcitrant attitude on the part of the policyholder or the adjuster employed—a clash in personalities or incorrect approach to the problem.

With or without a loss that brings to attention those interested, the situation regarding overinsurance is found in few cases, the tendency being to underinsure. In 1933 this organization pointed out to many property owners that prices were down and that insurance should be reduced to correspond. We had about 95 per cent coöperation in the suggestion. Later when prices showed an upward trend we advised an increase in insurance to correspond with price increase and with great difficulty we accomplished about 40 per cent coöperation.

Insurance involving property damage such as a fire or windstorm does not seem to confront those interested with much difficulty in a satisfactory settlement, thus it differs from third party liability which more frequently involves legal expense and at times court decisions.

L. D. STITT

Chicago, Illinois

Note on Chief Justice Fuller

■ May I commend your article on Chief Justice Fuller in the March issue of the AMERICAN BAR ASSOCIATION JOURNAL by Willard King of the Chicago Bar. I look forward to the publication of the entire book.

It may be of interest to note that beginning with the father of the Chief Justice there have been five generations of Fullers who have studied law and practiced in New England. The late Horace W. Fuller, founder and editor of the *Green Bag*, was a first cousin of the Chief Justice.

HENRY M. FULLER

Portsmouth, New Hampshire

Corrects Mr. Perlman on German Trials

■ Without detracting from Solicitor General Perlman's excellent article on "Habeas Corpus and Extraterritoriality" (March issue) I should like to point out two misapprehensions.

In discussing the trials of "lesser" war criminals, Mr. Perlman states that these later Nuremberg trials were composed of American judges and "the prosecutors were American". In the case of *United States* v. *Flick* one of the participating prosecutors was a delegate of the French Government: Charles Gerthoffer (pronounced jet-affair), a Judge of the Seine Tribunal and later the chief prosecutor in the French war crimes case against the Nazi industrialist Hermann Roechling. The prosecution staff for all twelve "lesser" trials numbered ninety-four; eighty-seven prosecutors were American; four Czech (none of them returned to Czechoslovakia); three stateless (one became a national of Germany; two became residents of Great Britain). All prosecutors were paid from American funds, the "foreigners" however at approximately one-half of the American pay scale.

Mr. Perlman states on page 251: "Bird was held for trial in Germany by a court martial since, as a civilian employee of the Army, he was subject to military law. In Germany, civilians not subject to military law have been tried by specially constituted military government courts, as was the case in the well-known instance of Mrs. Ybarbo who shot her sergeant husband." The distinction that Mr. Perlman draws is incorrect. Mrs. Ybarbo was subject to military law and could have been tried by court martial. However the Court of Appeals of the Military Government court system found (*Reports*, page 224): "If the defendant is not subject to the exclusive jurisdiction of courts martial and the Articles of War applicable, she, having been charged with a crime committed in the Occupied Zone of Germany, is subject to the concurrent jurisdiction of the Military Government courts if they are authorized to exercise that jurisdiction. They have been so authorized." Mrs. Ybarbo was convicted under the German Criminal Code which the court found applicable to United States civilians charged with crime in the United States occupation zone.

PAUL H. GANTT

Washington, D. C.

A Reader Answers Mr. Tatge

■ Having done some research on punishment of war crimes for many years ("War Crimes not tried under Retroactive Law", *New York University Law Quarterly Review*, January, 1947) I have read with interest the critique by Paul W. Tatge of Max Koessler's review of *Victor's Justice* in your March issue.

This interest changed into amazement when I not only found the widespread mistake being repeated that the war crimes were punished under retroactive law but also the

statement that Germany was not more "the instigator of the war" and "responsible for its atrocities than President Roosevelt and many pseudo-statesmen in the United States and Europe", that "the trials were cooked up by the war criminals of the four Allied powers to cover their own guilt".

I am not an American lawyer, but am an American and a lawyer, and as such might be allowed to express the opinion that these views, outragingly wrong as they are, would rather have their right place in a resuscitated *Nazi Law Journal.*

EMILIO VON HOFMANNSTHAL
New York, New York

Reasons for Adoption of Genocide Pact

■ The Genocide Convention, now in Senate committee, may be shelved unless public opinion is formulated soon in favor of its passage. Civic groups throughout the United States have endorsed the Convention and are backing immediate Senate ratification. The American Jewish Congress favors such action, not only because the Jewish people have been the classical victims of genocide, but because the Convention embodies a vast step forward in the imposition of law and order through international agreement. The American Bar Association through its House of Delegates, recently voted not to endorse the Genocide Convention. Here briefly are its main contentions and the answers made to them by the American Jewish Congress:

1. *Objection:* The Convention would work unconstitutional changes in the form of our Government.

Answer: The United States is already a party to a number of international treaties of a like character; *e.g.,* the convention for repression of slave trade; convention to suppress the slave trade and slavery; for the suppression of the abuse of opinion; convention on narcotic drugs.

2. *Objection:* It subjects American nationals to the jurisdiction of an international court.

Answer: There is nothing in the Convention that makes acceptance of such jurisdiction obligatory. When such a court is proposed, this country can, by debate and consideration, form its judgment. The United States has already approved of the principle of international penal courts and at Nuremberg and Tokyo has actually participated in their operation.

3. *Objection:* It inhibits freedom of expression.

Answer: Incitement to riot, to murder of officials, to mutiny and to other criminal acts, have long been regarded as criminal. The Convention seeks only to apply this principle to acts of genocide.

4. *Objection:* It is claimed that since our Constitution causes treaties to become effective upon ratification, the provisions of the Genocide Convention will become the domestic law of the United States before being implemented in other countries.

Answer: The Convention provides that each country, in accordance with its constitution "enact the necessary legislation to give effect to the provisions of the present Convention". The Convention, will not become the domestic law of the United States at any time earlier than it becomes the domestic law of any other participating state.

5. *Objection:* It is claimed that the Genocide Convention will be invoked against lynching and against racial segregation within the United States and that the Convention will therefore permit international agencies to meddle in problems that are particularly domestic.

Answer: To constitute the crime of genocide as defined in the Convention an act must be coupled with a specific "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". In a lynching, while the participating individuals might be tried for murder, or for conspiracy to commit murder, they could never be tried for genocide unless the requisite intent accompanied commission of the act. Only segregation with purposes similar to those motivating Nazi use of concentration and labor camps could violate the treaty agreement.

6. *Objection:* This country will be required to embark on a world-wide crusade.

Answer: The Convention obligates contracting parties to prevent and punish genocide only in their own territory. With reference to acts of genocide perpetrated in other states, the contracting parties are authorized only to call upon the competent organs of the United Nations to take appropriate action under the Charter of the United Nations.

Opposition to the Convention has been described by Professor McDouglas as follows:

"Opposition to the Convention moves from a complete misconception of the conditions under which we live to-day, a complete misunderstanding of the nature and the role of international law, a complete misunderstanding of our constitutional requirements and of the obligations imposed by the United Nations Charter, and a tragic failure to consider what national action calls for under the conditions of the present time."

I feel very strongly that the Convention should be passed.

A. S. ALBRECHT
Hartford, Connecticut

OUR YOUNGER LAWYERS

Richard H. Keatinge, Secretary and Editor-in-Charge, Los Angeles, California

Goldsmith's

WALTER P. ARMSTRONG, JR.

The Young Lawyer Celebrates Sixth Year of Publication

■ The first issue of *The Young Lawyer*, official publication of the Junior Bar Conference of the American Bar Association, appeared in January, 1945, under the editorship of Sidney S. Sachs of Washington, D. C. Since then it has continued on a bimonthly basis under the direction of Charles H. Burton, Washington, D. C., now Vice Chairman of the Conference (April, 1946—August, 1947), Ulrich Schweitzer, New York, New York (October, 1947—August, 1948), and its present editor, Walter P. Armstrong, Jr., Memphis, Tennessee, who has held that position since October, 1948.

The editor is assisted by a Board of Associate Editors consisting of Albert P. Blaustein of New York, New York; John L. Grabber of Washington, D. C.; James P. Healy of Tacoma, Washington; Bernard Lisman of Burlington, Vermont; and Robert G. Storey, Jr. of Dallas, Texas; and an Advisory Board of which the members are Charles H. Burton of Washington, D. C.; William R. Eddleman of Seattle, Washington; W. Carloss Morris, Jr., of Houston, Texas; and Ulrich Schweitzer of New York, New York; and two Student Bar Editors, Louie Nunn and S. W. Kellerman, Jr., both of the University of Louisville School of Law, Louisville, Kentucky.

Among the innovations in the publication of *The Young Lawyer* during the past two years, the most important has been the distribution, free of cost, to each approved law school, of a sufficient number of copies of each issue to furnish each member of the graduating class with an individual copy. This has been done with the coöperation of the Committee on Relations with Law Students and its Chairman, Charles W. Joiner, Ann Arbor, Michigan. This has proved an important and influential part of the Junior Bar Conference program that resulted in the organization and activities of the American Law Student Association.

Other innovations include the publication in each issue of an editorial dealing with some phase of Junior Bar Conference activities, a column in each issue written by and devoted to the activities of the National Chairman of the Junior Bar Conference, and a column headed "Student Bar Notes" in each issue dealing specifically with activities of the American Law Student Association. In addition, each issue undertakes to cover as fully as possible in the space available the general activities of the Junior Bar Conference, its officers and committees, and also of all local and state Junior Bar groups concerning which information is received. Numerous photographs of Junior Bar activities also appear in each issue.

As it approaches the end of its sixth year of existence, it can certainly be said that *The Young Lawyer* has fulfilled a definite purpose in connection with the American Bar Association, the Junior Bar Conference and the American Law Student Association. It is hoped that as each of these continues to grow, *The Young Lawyer* can keep pace with them and serve even further as a medium of exchange of ideas among the younger lawyers of this country.

Legal Aid Committee Undertakes Expanded Program

The Junior Bar Conference's Legal Aid Committee is organized for the practical purpose of insuring that persons are not deprived of legal advice and representation "because of lack of means or lack of understanding". Thus it seeks to assure that such legal services are available not only to the indigent but to persons of moderate means who may not recognize either their need for such services or their ability to pay for them. Three specific projects are being pushed by the committee this year and it is hoped that considerable progress in each of the following fields will be made:

Legal Aid Organizations. The committee seeks the eventual establishment of legal aid offices or clinics in all cities of over 75,000 population. The function of these offices is to relieve the poor in civil matters — to provide legal advice and assistance to those unable to pay for such services or unable to pay a fee sufficient to compensate a private practitioner.

This activity is undertaken in cooperation with the American Bar Association's Committee on Legal Aid Work, the Executive Director of which, Arthur Schoepfer, is also the consultant to the Conference's Legal Aid Committee in coöperation with the National Legal Aid Association.

Defense of Indigents Accused of Crime. Basic constitutional law entitles all persons accused of crime to defense by counsel. It is the belief of the committee that some continuing positive effort is necessary to insure that such representation is in fact afforded to indigent persons, and it is one of the Committee's functions to

provide some of that effort.

Local conditions do not permit a single approach to this problem. In some states counsel may be and in others counsel must be assigned by the court. In others, bar associations operate voluntary defender systems. Several states make available publicly employed "public defenders" to indigent persons accused of crime. Finally, many legal aid organizations appear in the criminal courts on behalf of the poor as well as ministering to their civil litigation needs. The committee members are prepared to assist in establishing or strengthening any such systems, are committed to work toward the best system for the locality concerned, and to support appropriate legislation where necessary.

Lawyer Reference Plans. The third, and perhaps most interesting sphere of committee activity, is the establishment of Lawyer Reference Plans in coöperation with the American Bar Association's Special Committee on Lawyers' Reference Service under the chairmanship of William M. Wherry. This activity is directed toward bringing clients who need legal advice and can pay reasonable fees for that advice to lawyers who need clients and who actually charge reasonable fees, without any governmental intervention to insist upon this mutually advantageous meeting.

In essence, an individual plan is quite simple: A local bar organization establishes the plan and continuously advertises the fact that, by availing themselves of the plan, potential clients will be interviewed by that organization's reference attorney, who will refer them to an outside private practitioner who will charge only five dollars for an initial consultation. Prospective clients are further told that all further fees will be arranged by the attorney with the client, and that, in case a dispute arises, the bar association will arbitrate. The bar association provides the reference attorney and maintains a list of lawyers to whom cases are referred by him in rotation. The plans are usually self-supporting and, where employed, produce new and additional legal business for the profession while at the same time dispelling the public misconception that legal services are beyond the reach of all but the well-to-do.

This is a brief outline of the Legal Aid Committee's 1950 program. The committee is organized primarily as a service committee—that is, its function is to assist local bar organizations to institute these programs rather than to institute them by direct action of the committee or its individual members. Five vice chairmen of the committee supervise its activities in the areas assigned to them, namely: Donald R. Harter, 800 Powers Building, Rochester, N. Y. (First, Second and Third Circuits); John Alexander, 301 Columbian Building, 416 Fifth St., N.W., Washington, D. C. (District of Columbia and Fourth and Fifth Circuits, excluding Louisiana and Texas); Louis A. Highmark, 1313 Merchants Bank Building, Indianapolis, Indiana (Sixth and Seventh Circuits); Grover C. Spillers, Ritz Building, Tulsa, Oklahoma (Eighth Circuit, Texas, Louisiana, Kansas and Oklahoma); and Ray R. Christensen, 433 Judge Building, Salt Lake City, Utah (Ninth and Tenth Circuits, excluding Kansas and Oklahoma). Robert D. Price, 332 Main Street, Worcester, Massachusetts, Council Member for the First Circuit, is the committee's council adviser.

Notice to Members of Junior Bar Conference of Election of Officers

■ Notice is hereby given that at the annual meeting of the Junior Bar Conference to be held in Washington, D. C., September 17, 18 and 19, 1950, there will be elected a Chairman, Vice Chairman and Secretary, each for a term of one year, a member of the Executive Council from each of the Second, Fourth, Sixth, Eighth and Tenth Federal Judicial Circuits, and a member-at-large from the Ninth and Tenth Circuits, each for a term of two years.

Pursuant to Section 4 (B) of Article IV of the By-Laws, notice is hereby given that the members of the Junior Bar Conference residing in the above named Judicial Circuits (hereinafter referred to as Council Districts) may nominate candidates for the office of member of the Council from their respective districts by written petition, in each case, specifying the name of the person nominated and the office for which nominated, containing the names of at least twenty endorsers, all of whom are residents of the district of the person nominated. The petition shall state briefly a biographical sketch of the background and qualifications of the candidate. It shall be submitted to the chairman, W. Carloss Morris, Jr., 1302 Rusk Ave., Houston 2, Texas, not later than September 2, 1950. At the first session of the annual meeting, the Chairman of the Conference shall deliver to the chairman of the Nominating Committee all petitions submitted pursuant to this notice.

The Nominating Committee shall consider the candidates proposed by each of said petitions, as well as receive names of other candidates and report its Council nominees at the same time and place and in the same manner that it reports the nominations for the officers of the Conference. Other nominations for the Council may be made from the floor following the report of the Nominating Committee, as may other nominations also be made for officers. The election of the Council members shall take place at the same time and place and in the same manner as the

election of officers, immediately following the conclusion of the second general session of the annual meeting, and shall be by written ballot.

TERM OF OFFICE: The terms of office of the officers shall begin on January 1, 1951, and shall continue until December 31, 1951, or until their successors shall be elected and qualify, and the terms of office of the Council members from the Second, Fourth, Sixth, Eighth and Tenth Federal Judicial Circuits and of the member-at-large from the Ninth and Tenth Circuits shall begin on January 1, 1951, and shall continue until December 31, 1952, or until their successors shall be elected and qualify.

ELIGIBILITY: No person shall be elected as an officer or member of the Council if he will, during his term of office, become ineligible for membership in the Conference. The membership of a member of the Conference shall terminate at the end of the calendar year within which the member attains the age of thirty-six years, or upon his ceasing, prior to that time, to be a member of the American Bar Association. A person elected as a member of the Council shall be, at the time of his nomination, a resident of the Council District for which he is chosen. No person shall be eligible for election as a member of the Executive Council if he is then a member of the Council and has been such a member for a period of three consecutive years or more.

RICHARD H. KEATINGE
Secretary, Junior Bar Conference

BAR ACTIVITIES

Paul B. DeWitt • Editor-in-Charge

Whitney North SEYMOUR

Conway Studios

■ Whitney North Seymour, former Assistant Solicitor General of the United States, was elected the thirty-fifth President of The Association of the Bar of the City of New York at its Annual Meeting in May. Mr. Seymour has served as Chairman of the Association's Executive Committee and the Committees on Grievances and the Judiciary.

Other officers elected were Norman S. Goetz, Morris Hadley, Francis Harding Horan, Maurice T. Moore and Franklin E. Parker, Jr., Vice Presidents; Chauncey B. Garver, Treasurer; and Frederick P. Haas, Secretary. New members of the Executive Committee are Frederick V. P. Bryan, Thomas Witter Chrystie, Carlyle E. Maw and Samuel I. Rosenman.

At the annual meeting the Association voted to request the American Law Institute to defer action on the Uniform Commercial Code in order to give bar associations and other interested groups additional time for study. Cody Fowler, State Delegates' nominee for President of the American Bar Association, was a guest at the Annual Meeting.

The Committee on Junior Bar Activities of the Association of the Bar of the City of New York has announced that it is sponsoring a nation-wide moot court competition along the lines of the competitions the committee has sponsored in past years and which have proved so successful. The national competition will be organized on the basis of regions corresponding roughly to the federal circuits. Sponsors in each region will conduct elimination competitions for the approved law schools in their region. The winners in each region will come to New York early in December for the final competition. Sponsors already designated include the Boston Bar Association, the Philadelphia Bar Association, the Bar Association of the District of Columbia, the University of Florida College of Law, the Southwestern Legal Foundation, the Bar Association of St. Louis, the Columbus Bar Association, and the Younger Members Section of the Illinois State Bar Association.

■ The National Conference of Judicial Councils held its annual luncheon meeting in Washington in connection with the meeting of the American Law Institute. Speakers were Charles E. Clark, Judge of the United States Court of Appeals for the Second Circuit, and Edward F. Johnson, General Counsel for Standard Oil Company of New Jersey. Chief Judge Bolitha J. Laws of the United States District Court for the District of Columbia, Chairman of the Conference, presided and announced the publication of the sixth volume in the Conference's judicial administration series, *Minimum Standards of Judicial Administration*, edited by Chief Justice Arthur T. Vanderbilt of New Jersey.

■ The Illinois State Bar Association conducted a successful Institute on the law of evidence and has published the lectures given as a "Trial Evidence Supplement" to the *Illinois Bar Journal*. Copies of the Supplement may be obtained at the price of $2.00 by writing to the Illinois State Bar Association, 907 First National Bank Building, Springfield.

■ The Committee on Continuing Legal Education of the American Law Institute, collaborating with the American Bar Association, reports a number of interesting events, past and future.

On September 16, 1950, in Washington, D. C., immediately prior to the official opening of the Annual Meeting of the American Bar Association, there will be a one-day Institute of importance to almost every lawyer in the country. The subject will be "Accounting Problems of Small Businesses". The morning session will include two lectures on "Basic Accounting for Lawyers", with the handbook of the committee written on the subject by Barton E. Ferst of Philadelphia, as the basis. The afternoon session will be somewhat more specialized and will include a lecture covering accounting problems of small corporations and accounting problems as affected by the taxation of small businesses.

The joint sponsors will be the Committee on Continuing Legal Education, the Junior Bar Conference of the American Bar Association and the Bar Association of the District of Columbia. The speakers will be prominent authorities in their respective fields who have had experience on the lecture platform. The practical aspects of the accounting problems of lawyers will be particularly emphasized. A modest registration fee will be charged. Information may be obtained from W. Carloss Morris, Jr., 1302 Rusk Avenue, Houston 2, Texas; Professor Bryce Rea, Jr., The American University, Washington College of Law, 2000 G Street N. W., Washington 6, D. C., and John E. Mulder, Director of the Committee on Continuing Legal Education, 133 South 36th Street, Philadelphia 4, Pennsylvania.

The committee has produced six publications included in Series I pursuant to its subscription plan, mentioned in previous issues of this section of the JOURNAL. The publications may be purchased separately for $2.00 per copy or $10.00 for the entire series. The six books to be included in Series II are in preparation and it is expected that they will be available for fall publication. They include the following:

Procedure Before the Bureau of Internal Revenue, by Edgar J. Goodrich and Lipman Redman of the District of Columbia Bar;

The Federal Wage and Hour Act, by Charles H. Livengood, Jr., of Duke University Law School;

Pretrial Practice, by Harry D. Nims of the New York Bar;

Bankruptcy and Arrangement Proceedings, by Leon S. Forman of the Philadelphia Bar;

Organizational Problems of Small Businesses, by Leonard Sarner of the Philadelphia Bar;

The Drafting of Corporate Instruments, by Dean Forest Hodge O'Neal of the Walter F. George School of Law, Mercer University, Macon, Georgia.

The committee is particularly interested in the creation of permanent, state-wide organizations to conduct programs of continuing legal education for members of their Bar. Several programs will be carried out on a preplanned basis for fall and winter sessions. The organizations should exist in every state that can carry them on in a self-supporting manner with a minimum cost to the members of the Bar.

During the summer months, James E. Brenner of Stanford University Law School will concentrate on the creation of such organizations in a number of Far Western states. Charles W. Joiner of the University of Michigan Law School will do likewise in some of the Middle Western states and the Director, John E. Mulder, will do the same along the Atlantic Seaboard.

It is expected that programs will be organized for the fall and winter of 1950-1951 in some fifteen states. Similar activities may follow in other states.

Meanwhile the committee has continued to coöperate with local bar associations in the conduct of institutes for members of the Bar in a number of places. A conspicuous example is Pennsylvania. The annual fifteen-lecture course was given in Philadelphia under the sponsorship of the Philadelphia Bar Association. The chairman of the Philadelphia committee (until his election to the Vice Chancellorship of the Philadelphia Bar Association) was Bernard G. Segal; he was succeeded by Mark E. Lefever.

During the past six months one-day institutes have been conducted in a number of smaller Pennsylvania communities under the sponsorship of county bar associations. Four successful institutes were conducted in Lancaster County by the county association under the leadership of Anthony R. Appel.

As a result, the York County Bar Association, led by Horace G. Ports, is planning a similar series. The latest group to join is that of Erie County where three institutes have been conducted in successive months under the leadership of Gerald J. Weber. Perhaps the most extraordinary example is to be found in Williamsport, Pennsylvania, where the Lycoming County Bar Association with Clyde E. Williamson as its leader, has carried on a series of five monthly institutes with more than 80 per cent of the Bar attending regularly.

These local events in Pennsylvania should be a model for other states and also suggest a central organization, such as that in California, which will make an annual fall and winter program of institutes available to all county bar associations.

On April 28 and 29, an unusually fine institute on "Trial Practice" was conducted with the committee's help by the Bar Association of St. Louis under the leadership of Edwin Grossman. Two hundred and twenty-five lawyers were present despite unfavorable weather conditions. The speakers were Geoffrey B. Fleming, Erwin W. Roemer, Joseph H. Hinshaw, Francis X. Busch and Leslie H. Vogel, all of Chicago, Illinois.

A one-day Institute on Organizational Problems of Small Businesses was successfully conducted in Syracuse, New York, under the auspices of the Onondaga County Bar Association on Saturday, May 20. The chairman was Theodore F. Bowes of Syracuse University Law School. The speakers were William H. Mathers, Thomas T. Richmond and Robert J. McDonald, all of the New York Bar. This is expected to be the fore-

National Conference of Judicial Council's luncheon meeting held in Washington, D. C., in connection with the Annual Meeting of the American Law Institute, May 18-20.

runner of similar programs organized throughout upstate New York.

An institute on "Lifetime and Testamentary Estate Planning" under the sponsorship of the State Bar of South Dakota will be the feature of the annual meeting of that organization in Sioux Falls on August 31. The chairman is Herman F. Chapman. One of the speakers will be Laurens Williams of Omaha, Nebraska; others will be announced later.

In connection with the annual meeting of the Wyoming State Bar Association, led by Dean Robert Hamilton of the Wyoming University College of Law and Alfred M. Pence, President of the Wyoming State Bar, there will be a one-day institute on "Legal Problems of Tax Returns" and a one-half day institute on "Pretrial Practice" on August 31 and September 1, respectively. Speakers will be announced.

The committee is also coöperating with the Jackson Junior Bar Association (Mississippi) in its annual institute which will be conducted in Jackson in November; the subjects and speakers will be announced later.

On March 22, 1949, the subject for discussion on the "On Trial" program, presented by The Association of the Bar of the City of New York over the television and radio networks of the American Broadcasting Company, was whether civil government should be extended to American colonies such as Guam. Taking the affirmative of this question were Foster Hailey of the editorial staff of the *New York Times* and author of *Half of One World* and Richard H. Wels, a member of the Association's Special Committee on Broadcasting and formerly special counsel to the House Naval Affairs Committee. Taking the negative were Captain Willis W. Bradley, USN, former naval governor of Guam and member of Congress, and Maurice H. Thatcher, former governor of the Panama Canal Zone and member of Congress. Presiding was Supreme Court Justice Thomas L. J. Corcoran of New York.

In the audience was F. B. Leon Guerrero, Guam lawyer and member of the Guam Congress, who was in the United States in connection with his duties as Guam Boy Scout Commissioner. Guerrero obtained a recording of the program and took it back with him to Guam.

Now in the United States as a member of the Guam delegation to urge upon the United States Congress the enactment of an organic act for Guam and of a law giving Guamanians American citizenship, Guerrero brought back with him an interesting account of the reception that this recording received in this American outpost in the Pacific. A special session of the Guam Congress was held to hear the record. Thereafter, it was played for several days through amplifiers in the public square in Agana, Guam's capital city. Special auditions were held for the Governor of Guam and his staff and naval officers stationed on the island. Because of the wear that the record received through its many playings, it has now been placed in the custody of the Guam Historical Society and made a part of the archives of the island.

Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, Joseph S. Platt, Committee Chairman, Harry K. Mansfield, Vice Chairman.

Deductibility of Professional Expenses

■ Lawyers necessarily have a close interest in the deductibility of various expenses incurred by members of professions. A recent case seemed to indicate that a teacher was going to be the victim of an unwarranted narrow point of view on the part of the Treasury and the Tax Court, but the Court of Appeals for the Fourth Circuit has just come to the rescue.

In *Hill* v. *Commissioner*, — F. (2d) — (C. A. 4th, May 19, 1950), reversing 13 T. C. 291, a Virginia public school teacher incurred expenses by attending summer school at Columbia University where she obtained credit for two courses. Virginia requires a teacher to hold a certificate, and, to renew a certificate, a teacher must either present additional college credits or else pass an examination upon prescribed books. The teacher's certificate expired so that she attended Columbia summer school to comply with the renewal requirements in order to be eligible for reëmployment. The Commissioner denied a deduction for the summer school expenses on the ground that they were personal and not deductible. The Tax Court sustained the Commissioner's determination. It took the view that there was no evidence that summer courses were an ordinary method of meeting certificate requirements and, in addition, that the expenditures were for reëmployment, and thus in effect for a new job.

Judge Dobie, himself a former teacher, albeit a law school teacher, had no sympathy with the Tax Court's reasoning. He was satisfied that obtaining course credits was a reasonable method of satisfying certificate requirements, and statistical information as to the election of that particular method was unnecessary. Also the teacher obviously was maintaining her present position, not attaining a new one. Judge Dobie gave even shorter shrift to the Commissioner's attempt to prove the expenses to be personal by demonstrating that the teacher actually enjoyed summer school.

Judge Dobie noted that the Commissioner allows teachers to deduct as ordinary and necessary business expenses amounts spent for dues to professional societies, subscriptions to professional journals and travel expenses to conventions, even though a teacher probably could pursue her career without incurring these expenditures (see I. T. 3448, 1941-1 Cum. Bull. 206). He seemed to adopt a criticism of the Tax Court by Professor Maguire (in 35 *American Association of University Professors Bulletin* 748, 762) that the Tax Court's opinion hinted at "strong distaste for this sort of deduction". However, Judge Dobie carefully refrained from holding that all summer school expenses by teachers are deductible.

It would seem that the teaching profession owes a vote of thanks to the teacher in this case for expunging an undesirable Tax Court precedent inasmuch as a deficiency of only $57.52 was at stake. Perhaps this is another instance of the assumption of public responsibility by members of the professions.

Liberty and Law
(Continued from page 526)

solutely cold. The administrative agency seems to me to be the only practical means of doing the job that we are bound to do if we are to preserve the liberties of the individual against the abuses of economic power on the one hand and state socialism on the other. No one would argue, I suppose, that railroad rates should not be regulated by the State or that such regulation is not a legislative matter; but no man of sense would advocate that Congress take over the work of the Interstate Commerce Commission. If it were to do so, it would never get the job done and would not have time for anything else. The Federal Trade Commission, the Federal Power Commission, the Securities and Exchange Commission, the Civil Service Commission, the National Labor Relations Board, the Workmen's Compensation Commission, the public service commissions of the several states, and dozens of others operating under the Federal and State Governments are operating on the same general principles as the Interstate Commerce Commission.

Administrative Tribunals Need Not Destroy Freedom

To my mind it is utterly futile to inveigh against the growth of these tribunals. The problem is, not how to prevent their growth, but how to preserve in their processes the fundamental principles of freedom.[9] In these processes, some mingling of legislative or judicial functions with executive functions is frequently necessary; but we must see to it that not only the spirit of justice and fair play but also the ultimate separation of these powers is preserved so that no single agency of the people may have opportunity to arrogate sovereign power to itself. This means, in brief, that the legislature must not be permitted, under guise of delegating administrative functions, to abdicate its essential legislative or policy-making power to the execu-

9. Report of Special Committee on Administrative Law, 64 A.B.A. Rep. 575 *et seq.*; 63 A.B.A. Rep. 331 *et seq.*; Report of Committee on Administrative Agencies and Tribunals of Section of Judicial Administration, 64 A.B.A. Rep. 407.

tive, and that, for those whose rights are affected by administrative action, judicial review by an independent judiciary must be preserved inviolate.

The Federal Administrative Procedure Act has in large measure eliminated the abuses that had arisen in connection with administrative agencies in the Federal Government and furnishes a pattern to be followed by the states. For the future there is not so much danger that these agencies will abuse the power granted them as that they will be hamstrung by the courts in reviewing their decisions, a danger to which Chief Justice Stone adverted in his address at Harvard on "The Future of the Common Law", wherein he said:

> Our concern for the future should be not so much to secure for the citizen the adequate protection which, under the Constitution, cannot be denied, as to secure a more unified system of administrative procedure and to make certain that court review, whether by constitutional or statutory requirement, shall not go beyond that need, and shall be made available at such time and in such manner as will not unnecessarily impair the efficiency of the administrative agency, or duplicate its work by courts.

Courts Must Protect Individual from Power of Government

Although it is important to the preservation of liberty that the powers of government be expanded for the regulation of economic life, it is even more important that, in this expansion, the fundamental liberties of the individual—personal security, personal liberty and private property—be safeguarded, for as government becomes more and more powerful there is greater and greater tendency to ignore these rights. It is reassuring, therefore, to know that with expanding governmental powers our courts have given them the greatest attention. The right to fair trial, to be free of unreasonable searches and seizures, to be protected against inquisitorial methods of the police, to be represented by counsel, to have a jury fairly selected, to have fair participation in the governmental process without discrimination on account of race or color—all these have been emphasized more strongly in recent decisions than ever before. It seems that the courts have sensed that with the expansion of governmental powers the rights of the individual will be overborne here as they have been in so many of the countries of Europe unless they are protected with the utmost care, and this is particularly true with respect to that right which is the most fundamental of all, the right of freedom of speech.

The importance of freedom of speech to the happiness of the individual and the progress of the race cannot be overemphasized. Truth is apprehended in the mind of the individual. Its progress is fraught with difficulties and only through free expression can it hope to gain acceptance by the majority in the community. To the objection that free speech may lead to the propagation of error, the answer is that the truth is able to take care of itself and that in an atmosphere of freedom error will be detected and exposed for what it is. No wiser opinion was ever delivered than that of Gamaliel, who, when the teachers of Christianity were brought before him, said "Refrain from these men and let them alone; for if this counsel or this work be of men, it will come to naught. But if it be of God, ye cannot overthrow it".[10] And as John Stuart Mill has pointed out in his Essay on Liberty, truth itself is benefited by free expression of opposing views. In contest with error, it becomes vital, a living force in the minds of those who accept it rather than dead dogma imposed by authority. Who does not realize that the great political truths embodied in our free Constitution are a greater force today in the lives of our people, just because of the fact that they have been challenged by the false philosophies of the totalitarian states of Europe?

Splendid expression of the philosophy underlying this right is to be found in the concurring opinion of Mr. Justice Brandeis in *Whitney* v. *California*, 274 U. S. 357, 375, where he said:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Justice Brandeis refers in a note to the following quotations from Mr. Jefferson:

> "We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors and especially when the law stands ready to punish the first criminal act produced by the false reasonings; these are safer corrections than the conscience of the judge." Quoted by Charles A. Beard, The Nation, July 7, 1926, vol. 123, p. 8. Also in first Inaugural Address: "If there be any among us who would wish to dissolve this union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."

10. Acts 5:38, 39.

All this should be self-evident. It has been said by wise men so many times over in the world's history that I should apologize for saying it were it not for the fact that there is such great temptation to forget it whenever an unpopular minority says something that strikes at the foundation of what we ourselves believe in. It is easy enough to believe in freedom of religion for Episcopalians or Baptists or Presbyterians. The test is whether we believe in it for Mohammedans or atheists. It is easy enough to believe in free speech for Republicans and Democrats. The rub comes when it is applied to communists and fascists and others whose teachings would subvert our institutions. We must never forget that unless speech is free for everybody it is free for nobody; that unless it is free for error it is not free for truth; and that the only limitations that may safely be placed upon it are those that forbid slander, obscenity and incitement to crime.

Academic Freedom Is Essential

Another angle to the problem of free speech is presented in the field of public education. It is obvious that the teachers in our schools, colleges and universities have a tremendous influence on the thoughts and ideals of the rising generation; and many well-meaning people, for that reason, favor a restriction upon their right to speak the truth as they see it. The question of academic freedom is not an "academic" question, as those of us who have served on boards of trustees know too well; but every argument that can be made for freedom of speech generally can be made with tenfold force in favor of academic freedom. In the schools and colleges the leaders of the future are being trained, the standards and ideals of the people are being forged, and there, if anywhere, the human intelligence must have free play. It is a sad day for any institution of learning when it turns out of doors any of its teachers for what he has said or taught; for this is a warning to those that remain that, as they value bread and reputation, they must tread the beaten paths of mediocrity, turn aside from the golden quest of truth and bury within their hearts any thought out of harmony with the past. It is better, in the language of the Psalmist, that the "heathen rage" and that "the people imagine a vain thing" than that this fate overtake an institution of learning. What it can mean to the intellectual life of an entire people is graphically illustrated by what has recently happened in Germany.

On the other hand, traitors to the country or those that are seeking to overthrow the government by force should not be allowed to find a haven within our institutions of learning and I have no doubt that ways will be found to get rid of them without any abridgment of academic freedom. There is a vast difference between the expression of views patriotically and honestly held, even though they be erroneous, and the conduct of one who seeks to foment civil strife or who lends himself to the purposes of a foreign and hostile power.

Time Is Ripe for World Government

Almost overnight the United States has become the leader of civilization in a world that has become in a very real sense one great community; and the outstanding question that confronts us today is how we shall use that leadership. It is perfectly clear that a popular government like ours is not fitted to establish a world empire; on the other hand, we are better fitted than any other nation that has ever existed to lead the nations of the world in the establishment of a free world society. The one great thing that came out of the war just ended was the movement of peoples the world over for the establishment of some sort of world order based on law. As the war drew to an end, there was everywhere the feeling expressed by Mr. Willkie that the world had truly grown into one great community and that the future peace of mankind depended upon the recognition of that fact and the setting up of adequate legal machinery to regulate its life and relationships.

We think too often of peace as the mere absence of conflict, but peace is a positive thing. We have peace only when life functions in accord with the laws of life. I have peace in my body when the various members function in accordance with the laws of the body. We have peace in a city when the various citizens obey the laws of the city. We have peace in a State when the necessities of the life of the State are properly expressed in law and the law is adequately enforced. And we shall have peace in the world only when proper provision is made to express the demands of the life of the world community in terms of law, binding upon individuals as well as nations, and adequately to enforce that law.

The time is ripe for development of such a world order. With the improvements that have come in transportation and communication any part of the world can be reached from any other part in a few hours' time and communication is but a matter of seconds. Life throughout the world has become complex and so interrelated that any serious disturbance anywhere disturbs the peace of the entire community. The development of the atomic bomb has added a new and terrible danger to war and there is no longer any such thing as protection by natural barriers. A war breaking out anywhere can envelop us and bring unbelievable destruction upon our people before we know that it has so much as begun. It is idle to talk of isolation. We tried to stay out of the last war and the one that preceded it; but were dragged into them in spite of everything that we could do. The only hope for any sort of security lies in coöperation with other nations; and the only hope of permanent coöperation lies in the development of institutions based on law.

We have accepted the challenge of world leadership and have begun the building of a legal world order. First came the adoption of the United Nations Charter under our leadership at San Francisco, which, whatever else it has done, has at least given

us a world forum in which the conscience of mankind may express itself with respect to world affairs. Next came our adherence to the World Court, which, whatever else it may mean, means at least this: that the most powerful nation on earth has thrown the strength of its influence behind the juridical settlement of international controversies. And last but not least came the trials of the Nazi and Japanese war criminals by international courts set up under our leadership with the coöperation of practically all the civilized nations of the world, which means that civilization has denounced aggressive war as criminal and has established individual responsibility for crimes against international law.

United Nations Is Noble Beginning

I have high hopes for the United Nations; and I shudder to think what might have happened in the last four years if this foundation of world order had not been in existence. Prophets of evil point to the League of Nations and prophesy failure; but I remember that the League of Nations without the United States was "Hamlet without the Prince of Denmark". No man is wise enough to know what the League might or might not have accomplished if American statesmen like Elihu Root, Charles E. Hughes, William H. Taft or Newton D. Baker had sat in its councils and helped direct the course of world affairs in the stormy years following World War I. The United Nations means not only that we have provided a world forum for the discussion of world problems and a world court for the settlement of the world's disputes, but also that in the Security Council we have provided a certain pooling of the world's force with a group of the world's leading statesmen charged with the responsibility of seeing that law is enforced and the world's peace preserved.

We have made a noble beginning. Rome was not built in a day: our own great Republic required decades of experience to achieve maturity: and I have no doubt that with the passage of time the United Nations will grow into an organization that will bring peace and security to the world community. The ideals and standards upon which we can all agree may not be so many at first; but, given an organization in which reason can assert itself they will multiply and expand with the ever-circling years. It is not important whether we have a bill of rights or a code of laws at the beginning. What is important is that we have made a beginning and have set up a framework in which a structure of law can be developed in a natural process of evolution as reason is brought to bear on the world's problems and relationships. In the language of Washington, we have raised "a standard to which the wise and the honest can repair; The event is in the hand of God".

May I in conclusion draw together the scattered strands of what I have had to say about the rôle of law in a free society? It is this: A free society is one in which the people themselves exercise sovereign power and the State respects certain fundamental rights as belonging to the individual. Law is not force imposed from without upon the social organism, but the life principle of that organism, expressed in adequate rules and standards. A proper development and expression of the law is necessary not only for the peace and order of the community but also for the preservation of its freedom. One of the great problems in the preservation of liberty under law arises in connection with the expansion of governmental power to provide effective regulation of economic life; and in the administrative agency we are finding a solution to this problem. Growth of governmental power due to expanding economic life, however, makes it necessary that we guard with jealous eye the fundamental liberties of the individual, foremost among which is freedom of speech in that it is essential to intellectual progress and the guardianship of all other liberties. Finally we have taken account of the fact that our own free society has suddenly become the leader in the larger life of the world and that the future of the liberties of mankind depends upon the quality of our leadership. In the United Nations we have made a beginning in the establishment of a free world order based not upon selfishness and force but upon law and reason and righteousness.

The dream of the founding fathers of America, liberty under law, has, in our generation, become the dream of all mankind. It is not too much to hope that under our leadership that dream may become a reality throughout the civilized world.

Administrative Law of Michigan

(Continued from page 530)

claratory judgment proceedings are available and, if so, under what circumstances, is not entirely clear. Ordinarily, a party wishing to contest the validity of a rule must do so by seeking judicial review of an administrative order which has been entered against him pursuant to the application of the rule.[41] In this instance, again, the adoption of the provisions of the Model State Act (authorizing declaratory judgments as to the validity of rules) would fulfill a frequently noted need.

However, the legislature exercises a high degree of supervisory control over the whole process of administrative rule-making. It is required by statute[42] that all rules must be filed with the legislature, to be transmitted to appropriate committees for study. If as a result of such study, the legislature deems the rule to be for any

41. *Athletic Association* v. *Grand Rapids*, 274 Mich. 147, (1936). In some cases, the validity of rules has been tested by injunction proceedings. *Reed* v. *Civil Service Commission*, 301 Mich. 137, (1942).

42. M.S.A. § 3.560(7) *et seq.*

reason undesirable, it may be abrogated by concurrent resolution. Recently, the legislature created a joint legislative committee on administrative rules to sit between sessions with certain powers to suspend the operation of newly adopted administrative rules until the next regular session of the legislature.[43]

Methods of Judicial Review Are Complex

To describe an old-fashioned patchwork quilt is not easy. Its varied hues and odd-shaped segments defy precise delineation, except through photographic processes. Similar difficulties attend any attempt to present a summarized description of the method by which decisions of the Michigan agencies are brought before the courts for review. The diversities of statutory and common law procedures rival the geometric irregularities of the cloth patches on the quilt.

Ten methods of appeal are provided with respect to the eight agencies[44] which produce most of the grist for the judicial mill.[45] Examination of the salient features of these ten statutory appeal procedures discloses wide disparities and complete lack of uniformity. There are five alternate requirements as to the court to which the appeal should be taken.[46] Likewise, there are found (among the ten statutory appeal procedures) five divergent methods of applying to the reviewing court.[47] Three dissimilar provisions exist as to the record on which the appeal is heard.[48] The problem as to obtaining an interim stay of the administrative order, pending decision on appeal, is treated in four different ways.[49]

In view of these conflicting provisions, it is easy to appreciate the confusion created in the minds of Michigan lawyers by the provision of one recent statute that appeals from the Aeronautics Commission should be prosecuted "in the manner provided for the review of the orders of other administrative bodies of this State".[50]

As might be expected, considerable inconvenience results from the vagueness and complexity of these statutory provisions for review. In some instances, it is doubtful what statutory procedure should be used, and after this question has been solved there remains a further problem of mastering the procedural intricacies of that particular method. Many of the statutes fail to particularize the details of appellate procedure and such details can be ascertained only by time-consuming personal inquiry or by painstaking examination of lower court decisions, reports of which are not readily available. Obviously, adoption of a uniform appellate procedure, such as that set forth in the Model State Act, could accomplish substantial good.

Despite the wide choice of statutory appeals offered (or perhaps because of the character and uncertainty of the statutory methods) attorneys often choose to obtain judicial review of administrative determinations by filing injunction suits. Under Michigan case law, this remedy is available not only where the administrative action is void (in the jurisdictional sense), but also where the court can be persuaded that there exists an abuse of administrative discretion.[51] Contrasted with the stringent restrictions which many other states impose on the availability of the writ of injunction as a means of reviewing administrative orders,[52] the liberality of the Michigan court in this respect is a further indication of the state's general attitude that all administrative action should be carefully supervised.

Other so-called common law remedies are but little used and their use is on the whole subjected to the same restrictions which are found in most other states.[53]

Scope of Judicial Review Not Always the Same

To obtain any complete picture of the scope and extent of judicial review in Michigan, it would be necessary to consider separately the court's rulings on appeals from the several different agencies whose determinations receive judicial scrutiny. In

43. Act No. 35, P.A. 1947, M.S.A. § 3.560 (14e).

44. Public Service Commission, Workmen's Compensation Commission, Department of Revenue, Unemployment Compensation Commission, Liquor Control Commission, Corporation and Securities Commission, Insurance Department and Banking Department.

45. In the case of the Public Service Commission, the method varies according to the type of order involved (M.S.A. §§ 22.45 and 22.585); and in the case of the Department of Revenue, the method of appeal varies according to the identity of the appellant—M.S.A. § 7, 657(9).

46. In four cases, the appeal lies only to the Circuit Court for the County of Ingham (the county in which the state capital is located); in three cases, the appeal may be taken to any circuit court; in one case there are special alternate provisions as to circuit-court venue; in one case, the appeal is direct to the state supreme court; and in one case, the appeal is taken to a court of claims.

47. In four cases, the application is made by statutory petition for review; in two cases, by *certiorari* "or any other method permissible under the rules and practices of the Courts"; in two cases, by independent suits in equity; in one case, by demand for statutory trial *de novo*; and in one case, by common law *certiorari*.

48. In six cases, review is on the administrative record; in three cases, review is had on the record supplemented by such additional testimony as may be offered; and in one case, there is provision for taking additional testimony to be recertified to the agency for its further consideration.

49. In three cases, the appeal operates automatically as a stay; in two cases, there is provision for obtaining a stay on proper application; in one case, no stay is obtainable; and unfortunately in the other four cases it is quite impossible to ascertain from the governing statute whether or not an application for such relief may be allowed.

50. M.S.A. § 10.302.

51. As the state supreme court recently put it: "Injunction is the appropriate remedy to determine whether rights have been affected by the arbitrary or unreasonable action of an administrative agency. If the discretionary power of an administrative agency is abused or its judgment improperly exercised, the judiciary has the right to restrain the same." *Reed v. Civil Service Commission*, 301 Mich. 137, 152 (1942). To the same effect, see *Wetherby v. City of Jackson*, 264 Mich. 146 (1933).

52. *E.g.*, *United States Trust Co. v. Mayor*, 144 N.Y. 488 (1895); *Stone v. Heath*, 179 Mass. 385 (1901).

53. *Certiorari* (except where established as a statutory method of appeal) is available only to review quasi-judicial determinations. *Township of Beaverton v. Lord*, 235 Mich. 261 (1926). The writ is allowed only where no other remedy is available. *Rapid Railway Co. v. Utilities Commission*, 225 Mich. 425 (1923). When the writ is granted, the scope of review is ordinarily confined to matters that are clearly questions of law. *Goodfellow v. Detroit Civil Service Commission*, 312 Mich. 226 (1945).

Mandamus is available only where the law defines the duty to be performed with such certainty and precision as to leave nothing to the exercise of discretion and judgment; and its issuance is ordinarily confined somewhat strictly to such cases. *Toan v. McGinn*, 271 Mich. 28 (1935).

Writs of prohibition are ordinarily limited to cases where the administrative function is quasi-judicial, and where no other adequate remedy is available. *Triangle Land Co. v. Auditor General*, 172 Mich. 289 (1912). Its use is substantially confined to preventing the assertion of jurisdiction where none exists. *Renaud v. State Court of Mediation*, 124 Mich. 648 (1900).

Michigan, as elsewhere, the extent of review is not uniform and unvarying, but is dependent to a substantial degree upon the identity of the agency whose decision is challenged.[54]

In the absence of such detailed examination, no precise conclusions can be stated, but it remains possible to determine the general attitude of the Michigan court by examining its rulings in certain typical case situations.

The Michigan law affords judicial review of every issue made judicially cognizable by the Model State Act; and, in general, the Michigan court and legislature adopt the principles set forth in the Model Act to define the scope of review. However, the court's interpretation of these principles produces in actual practice a more searching review than would be available in other jurisdictions under a more restrictive interpretation of the same provisions.[55]

Strict Rules Applied in Determining Validity of Orders

The Michigan court is always willing to consider charges of abuse of discretion, and not infrequently it finds abuse of discretion in situations wherein some other courts might consider the discretionary determination of the agency to be nonreviewable. Thus, even in such matters as granting an extension of time for taking intra-agency appeals,[56] denial of pension applications,[57] and quarantine orders of a public health officer,[58]—situations where the breadth of administrative discretion is elsewhere deemed to be practically unlimited—the Michigan court is not loath to find that abuse of discretion exists. In zoning cases, likewise, the court goes far in reviewing the reasonableness of the administrative determination.[59]

By treating as questions of law certain issues which some other courts would call nonreviewable determinations of fact,[60] the Michigan court exercises a far-reaching degree of control over the decisions of the state's agencies. Thus, the Michigan court will decide, as issues of law, whether a place of business is a "workshop";[61] whether an individual is "available" for work;[62] whether two factories should be considered a single "establishment";[63] whether a person is a "dependent";[64] whether there exists a "necessity" for a new bank,[65] and other issues which the United States Supreme Court would probably treat as being nonreviewable, except to the extent of ascertaining whether the administrative determination had "roots in the record" and was not "forbidden by law".[66] Contrary to federal courts,[67] the Michigan court holds that where findings made by an agency are based on stipulated or undisputed facts, the findings are mere legal conclusions, the propriety of which the court may determine.[68]

Courts Sometimes Have Power To Try *De Novo*

In at least three cases, the Michigan legislature has conferred upon the lower courts power to consider *de novo* the evidence heard by the agency and to revise the agency's factual findings.[69]

In the other cases, the Michigan court reverses factual findings only if they are not supported by substantial evidence; but since the court holds that there cannot be substantial evidence unless there exists in the record at least a residuum of legally competent evidence sufficient to support the findings,[70] the court can more readily find a lack of substantial evidence than can some other courts which hold that evidence may be "substantial", even though not legally competent.[71] Somewhat akin to this "legal residuum" rule is the principle, which is firmly established in Michigan (although courts in some other states have contrary notions), that the court may examine the evidence to determine whether or not two opposed inferences are equally consistent with the established facts. If the court does so find, the rule is applied that the inference of nonliability must prevail, even though the agency had chosen to draw the opposite inference.[72]

Contrary to the recent trend in the federal courts,[73] the Michigan court insists vigorously on its rights to de-

54. Such matters as the character of the administrative procedure in the particular agency, its experience, its reputation for fairness and impartial expertness, its freedom from political bias, and the like, are all factors which would have to be considered in a detailed analysis. Similarly, the scope of review is broader where the agency exercises powers that are primarily judicial than in cases where its function is predominantly legislative. The extent to which true discretionary powers are vested by the statute in the agency is likewise a factor which necessarily affects the scope of review. Again, the Michigan court exhibits the usual tendency to probe the administrative determination with greater restraint in cases involving the conduct of public business than in cases affecting the regulation of private business.

55. An exception should be noted in the field of workmen's compensation cases, where as to purely factual issues the court will refuse to reverse the administrative finding even though it appears plainly wrong in view of the entire record, if there is any competent evidence to sustain the award.

56. *Dodge* v. *General Motors Corporation*, 321 Mich. 503 (1948).

57. *Randolph* v. *Dearborn*, 298 Mich. 224 (1941).

58. *Rock* v. *Carney*, 216 Mich. 280 (1921).

59. *Pere Marquette Ry. Co.* v. *Muskegon Township Board*, 298 Mich. 31 (1941); *Ervin Acceptance Co.* v. *Ann Arbor*, 322 Mich. 404 (1948).

60. A significant example in this connection can be taken from the field of workmen's compensation. Suppose that an injury is suffered by an employee under stipulated circumstances, and a determination must be made as to whether or not, on such agreed facts, the injury arose "out of and in the course of his employment". Is this issue one of fact or law—is it reviewable or not? The United States Supreme Court not long ago (*Cardillo* v. *Liberty Mutual Insurance Company*, 330 U. S. 469 (1947)) treated such a determination as nonreviewable. But even more recently, the Michigan court reached the opposite conclusion—*Haggar* v. *Tanis*, 320 Mich. 295 (1948).

61. *Fritz* v. *City Mission Board*, 281 Mich. 582 (1937).

62. *Dwyer* v. *Unemployment Compensation Commission*, 321 Mich. 178 (1948); *Ford Motor Co.* v. *Unemployment Compensation Commission*, 316 Mich. 468 (1947).

63. *Chrysler Corporation* v. *Smith*, 297 Mich. 438 (1941).

64. *Kimber* v. *Consumers Power Co.*, 229 Mich. 663 (1925).

65. *Moran* v. *State Banking Commissioner*, 322 Mich. 230 (1948).

66. *Cardillo* v. *Liberty Mutual Insurance Company*, 330 U. S. 469, 478 (1947).

67. *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944); *Corn Products Refining Co.* v. *FTC*, 324 U.S. 726, 739 (1945).

68. *Kimber* v. *Consumers Power Co.*, 229 Mich. 663 (1925).

69. Such is the case as to certain proceedings of the Public Service Commission (M.S.A. § 22.585); appeals from the Appeal Board of the Unemployment Compensation Commission (M.S.A. § 17.540); and in various excise tax cases, where a trial *de novo* may be had in the Court of Claims on appeal from the Department of Revenue (M.S.A. § 7.657(9)).

70. *Swedberg* v. *Standard Oil Co.*, 271 Mich. 184 (1933).

71. *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F.(2d) 362 (C.A. 2d 1938).

72. *Byrne* v. *Clark Equipment Company*, 302 Mich. 167 (1942); *Riley* v. *Kohlenberg*, 316 Mich. 144 (1946).

73. See report of Attorney General's Committee on Administrative Procedure, Sen. Doc. No. 8, 77th Cong. (First Sess.) 1941, page 210.

termine *de novo* issues of jurisdictional fact, even where the question as to the existence of jurisdiction depends on so technical a factual issue as to whether the principal object of a proposed drain is to drain highways or to drain adjacent farm lands.[74] The rule permitting judicial determination *de novo* of questions of constitutional fact is also vigorously sustained.[75]

In describing the extent to which it reviews administrative determinations, the Michigan court employs language very similar to that employed by most other courts. Statutes prescribing the scope of review use, in the main, the same stereotyped phrases—"findings supported by substantial evidence shall be conclusive," "questions of law shall be reviewable", and the like. But it would seem that these common-place phrases are of little utility in defining the actual scope of review available, for operating under the same general maxims, the Michigan court tends generally toward a somewhat more extensive review of administrative action than do many other courts.

The Michigan legislature and the state's court have joined in exercising a high degree of superintending control over administrative action. This control is achieved principally by the practice of judicially circumscribing grants of power, by frequent legislative reëxamination of administrative rules, and by comparatively extensive judicial review of administrative decisions. Through these devices, the state has sought to implement the general policy of assuring just, informed and wise administrative action; and these devices have been fully utilized. There has not been such full utilization, however, of other devices which are designed to serve the same general purpose but which operate through the agencies themselves—such as the provisions found in the Federal Administrative Procedure Act and the Model State Act guaranteeing fairness in administrative hearing procedures, assuring that decisions shall be made by officers who are personally familiar with all the evidence, requiring systematic procedures (with advance public notice and opportunity for public participation) in rule-making activities, and providing a uniform method for judicial review.

74. *Dunn* v. *Meyer*, 253 Mich. 563 (1931); *Fuller* v. *Cockerill*, 257 Mich. 35 (1932).

75. The court declared not long ago: "If a legislature attempts to make the findings of fact of its agencies conclusive, even though the findings are wrong, and constitutional rights have been invaded, the legislative action is invalid, for the judicial power of the courts cannot thus be circumscribed." *Milk Marketing Board* v. *Johnson*, 295 Mich. 644, 654 (1940).

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agement; and that no conception of justice demands that an exception to the rule of *respondeat superior* be made in favor of the resources of a charity and against the person of a beneficiary injured by the tort of a mere servant or employee functioning in that character. It is our judgment that the greater weights are in this scale.

Moreover, the now declared public policy of the State is that persons damaged by the torts of those acting as its officers and employees need not contribute their losses to the purposes of government. (Court of Claims Act, §12-a.) We think it would not be a harmonious policy that would require this plaintiff to put up with her injuries on the score that the appellant is a charitable corporation. (Cf. *Murtha* v. *New York H. M. College & Flower Hospital*, 228 N. Y. 183).

Judge Loughran's emphasis of basic principles of the common law, is evidenced by his opinion in *Advance Music Corporation* v. *American Tobacco Company*, 296 N.Y. 79. That case involved a commercial weekly radio program on which the defendants presented renditions of ten songs selected on the basis of their weekly survey as the ten most popular songs of the week. The plaintiff, a music publisher, complained that some of its songs, which it alleged were among the ten most popular compositions, were either passed over by the defendants or placed on their program in an improper order of popularity. In a complaint seeking damages and injunctive relief, the plaintiff alleged that the selection of songs by the defendants was made in bad faith and in an arbitrary manner and with intent to injure the plaintiff. Though the plaintiff alleged that it had suffered serious injury to its business because of the wide vogue enjoyed by defendants' radio program in the music industry, the plaintiff was unable to bring its factual situation within any of the recognized specific categories of tort, such as defamation, unfair competition or fraud and deceit. In consequence, the complaint was dismissed by the court below as not stating any cause of action.

Chief Judge's Opinion Revitalizes Common Law Tort Doctrine

Reversing the judgment of dismissal, Judge Loughran held that the categories of tort were not closed. He viewed the complaint as stating a cause of action under the general doctrine of the common law that the intentional infliction of temporal damage is *prima facie* actionable unless justified by the defendant. He reviewed the history of that *prima facie* tort theory, originally espoused in this country by Justice Holmes, and pointed out that the Court of Appeals had already previously sanctioned the application of that theory in an action brought by an employer against a labor union (*Opera on Tour, Inc.* v. *Weber*, 285 N.Y. 348). By his opinion in this case, Judge Loughran revitalized the old common law doctrine, but he cautioned that liability in any such situation would depend on the nature of the justification urged by the defendant,

and that the adequacy of an asserted justification would have to be determined upon the individual facts of each case. The implications of this decision, potentially far reaching as they are, remain to be developed in future litigation.

In *Estin* v. *Estin*, 296 N.Y. 308, Judge Loughran wrote an opinion of great importance on the subject of foreign divorce. The husband and wife in that case had both resided in New York, until the husband went to Nevada alone in 1944 and there obtained a final decree of divorce in an action in which the wife was not served personally in Nevada and did not appear. Two years prior to the entry of that divorce decree, the wife had brought an action for separation against the husband in New York, in which she was awarded a judgment of separation and permanent alimony payable in specified periodic amounts. The Nevada divorce decree made no award of alimony to the wife. In the action at bar, the wife sought to recover judgment for installments of alimony which had accrued under the New York judgment since the date of the Nevada decree. The courts below had upon ample evidence found that the husband was a *bona fide* resident of the State of Nevada and had been such at the time he had obtained the divorce. The judgment of divorce was therefore jurisdictionally valid and entitled to full faith and credit, under the decisions of the United States Supreme Court in *Williams* v. *North Carolina*, 317 U. S. 287, 325 U. S. 226.

The question before the Court of Appeals was whether the foreign divorce decree was effectual to nullify the prior New York judgment for alimony by virtue of its having severed the marital ties.

Carefully analyzing the legal rights of the parties, and giving effect to prior New York decisions that the wife's right to alimony under a matrimonial decree is a vested property right, Judge Loughran concluded that that right could not be affected by the *ex parte* divorce decree. The result in this case, certainly strongly supportable from a policy viewpoint, was predicated on sound legal theory.

Reviewing several New York cases in which a subsequent divorce was held effectual to terminate liability for alimony under a prior judgment of separation, Judge Loughran observed that in all those cases the divorce had been granted by a court that had jurisdiction of the persons of both parties and which accordingly was empowered to adjudicate the incidental personal and property rights of the parties. Upon the support of cited authority, he held that "the *res adjudicata* principle of the cases just cited—that as between two conflicting adjudications, the last must control—has no application where, as in the present case, the court which granted the last judgment was without jurisdiction of the person of the defendant". In the latter situation, as Judge Loughran pointed out, the foreign divorce could have only an effect analogous to that of an *in rem* judgment, with the result that it was valid to adjudicate upon and terminate the marital relation (the *res*), but could not be given the *in personam* effect of interfering with the wife's vested property rights.

United States Supreme Court Affirms *Estin* Decision

The decision in the *Estin* case was subsequently affirmed by a majority of the United States Supreme Court, in an opinion by Justice Douglas in which the approach taken by Judge Loughran was squarely upheld. *Estin* v. *Estin*, 334 U. S. 541.

Judge Loughran's discriminating care in the application of precedents and his keen analysis of the principles underlying particular decisional rules, are exemplified by two additional opinions.

In *Reif* v. *Equitable Life Assurance Society*, 268 N.Y. 269, the courts below had held the defendant insurance company liable, at the suit of a corporation's trustee in bankruptcy, for accepting checks of the corporation drawn by the latter's president, in payment of his wife's insurance premiums, merely because inquiry would have shown that the corporate drawer was at all such times theoretically insolvent. Though the corporate drawer remained a going concern throughout the period in question, and though the president was authorized to draw corporate checks for his personal use, being debited therefor on the corporation's books, the courts below decided against the defendant insurance company by application of the so-called trust fund doctrine, according to which the assets of a corporation are regarded as a trust fund for the benefit of its creditors.

Referring to the trust fund doctrine as a "fiction" that had "often been repudiated as . . . unsound in principle and vexing in business practice", Judge Loughran held that in any event it had no valid application to the facts in the case at bar, stating:

> The rule of responsibility of the payee of corporate paper is strict and sometimes harsh and is not to be extended. . . . We think that rule should not be stretched so as to apply it to the facts of this case upon the basis of the figurative expression that the capital of a corporation is held in trust for its creditors.

In *Banco C. I. Trust Company* v. *Clarkson*, 274 N.Y. 69, the question involved was the liability of a bank, upon its certifications of certain forged checks drawn on it, at the suit of a holder of the checks whose agent had procured the certifications while suspecting the forgeries. The plaintiff relied on the rule, embodied in the Negotiable Instruments Law, that the certification of a check by the bank on which it is drawn is equivalent to an acceptance and constitutes an admission of the signature of the drawer.

Tracing the rule in question back to its common law origin in search of its basic principle, Judge Loughran observed that it was intended only for the benefit of a *bona fide* holder who had no suspicion of the forgery. He accordingly concluded that the protection of the doctrine should not be extended to one whose agent had dishonestly procured the certification while suspecting the forgery.

Approach to *Stare Decisis* Is on Middle Ground

As regards the doctrine of *stare decisis*, Judge Loughran's approach has been on a middle ground typical of that of the Court of Appeals itself and well described, in the words of former Chief Judge Lehman, as that of striving for a proper balance between continuity and change in relation to previously declared decisional law—"a balance . . . which will permit progress, but progress along a road where the traditions and established principles of the common law will still serve as guide-posts".[6]

Though he has on many occasions afforded the common law full opportunity for growth in novel situations in which there was no precedent squarely in point, Judge Loughran has generally been averse, except in unusual cases, to overruling past decisions of the Court.

An exceptional situation of that kind was presented in *Vaughan* v. *State*, 272 N.Y. 102. That case concerned the constitutionality of a New York statute of 1933 which imposed a stamp tax on transfers of shares of par value corporate stock, measured solely by the number of shares transferred and without regard to the actual or face value of the shares. An earlier similar tax had been held invalid by the Court of Appeals in a decision rendered in 1907. Upholding the 1933 statute, Judge Loughran declined to follow the 1907 decision.

He pointed out in his opinion that since the date of the earlier decision the legislature had authorized the issuance of shares of no par value, thereby adopting "the view that face value as a symbol of the real worth of shares in a corporation was a conception that had been rebutted by experience". In Judge Loughran's words, "that change in policy and the consequent alteration of the corporate structure brought in its train problems of taxation which spread beyond the field of the newly authorized shares". It appeared that, to avoid taxation, many corporations thereafter reduced the face value of their par value shares, creating a serious problem for the state taxing authorities and providing ample warrant for the new taxing statute challenged in this action.

Against the background of these intervening changes in corporate organization and in the state's policy, Judge Loughran reëxamined the basis of the 1907 decision in the light of certain expressions of the United States Supreme Court on a related question and concluded that the earlier decision was unsound and could not stand in the way of the new legislation.

Recognizing the need for certainty in the law, Judge Loughran has at the same time himself been careful to leave open the way for any necessary modification in the future, particularly when applying some new decisional rule in a novel situation.

In two cases, Judge Loughran undertook to resolve the difficult problem of adjusting the respective interests of the life tenant and the remaindermen in connection with largely unprecedented transactions involving the salvaging of mortgage investments by testamentary trustees during the depression period. Those transactions concerned parcels of unproductive real property that the trustees had acquired through the foreclosure of mortgages in which assets of the trust estate were invested and that they were compelled to carry for a time, with resulting deficits, before sale because of the lack of a ready market therefor. Attempting to achieve a just balance between the interests of the life tenant and those of the remaindermen upon the ultimate sale of the parcels, Judge Loughran laid down the following general rules, in *Matter of Chapal*, 269 N.Y. 464, 472-473:

> In such an investment situation, what is involved is the salvage of a security. The security it is to be remembered is a security not for principal alone but for income as well. On a sale, therefore, the proceeds should be used first to pay the expenses of the sale and the foreclosure costs and next to reimburse the capital account for any advances of capital for carrying charges not theretofore reimbursed out of income from the property. Then the balance is to be apportioned between principal and income in the proportion fixed by the respective amounts thereof represented by the net sale proceeds. In the capital account will be the original mortgage investment. In the income account will be unpaid interest accrued to the date of sale upon the original capital. The ratio established by these respective totals determines the respective interests in the net proceeds of sale. . . .

In *Matter of Otis*, 276 N.Y. 101, Judge Loughran answered certain further questions left open in the *Chapal* case, involving mainly the rate and period of interest to be allowed in determining the share of the life tenant. He reached his conclusions upon careful analysis of the equities and reasonable expectancies of the parties. At the conclusion of his opinion in the *Otis* case, he was frank to state:

> Perhaps it should be added that a general rule for such situations cannot be attained at a bound, that no rule can be final for all cases and that any rule must in the end be shaped by considerations of business policy. Accordingly, we have here put aside inadequate legal analogies in the endeavor to express fair, convenient, practical guides that will be largely automatic in their application. Only the sure result of time will tell how far we have succeeded.

Understanding of Business Community His Guide in Commercial Law Cases

In matters of commercial law, Judge Loughran has been guided by the settled understanding of the business community as well as by rational judgment. Thus, in two cases he held that "an invoice, as such, is no contract", but is, rather, "a mere detailed statement of the nature, quantity and the cost or price of the things invoiced". Hence, he concluded, the acceptance by the buyer of goods of an invoice on which was stamped a provision for arbitration of all controversies between the parties, did not of itself constitute a contract for arbitration. (*Matter of Tanenbaum Textile Company* v. *Schlanger*, 287 N.Y. 400; cf. *Matter of Huxley*, 294 N.Y. 146).

In *Matter of New York Title & Mortgage Company*, 277 N.Y. 66, 77, in rejecting the argument that the

6. See Lehman, "Judge Cardozo in the Court of Appeals", 39 *Col. L. Rev.* 12, 19 (1939).

value of the underlying realty was the sole index of the worth of a mortgage, he stated in part:

> We suppose it is true that there never has been any market place for mortgages in the sense of a counter over which they could be exchanged for cash or its equivalent at prices publicly quoted currently. But everybody knows (and this record demonstrates the fact) that heretofore in times of good business there was a truly enormous trade in mortgages. Purchasers in that market had to determine whether to buy or not to buy the security and so must have had resort to some general tests of value. Indeed fractional shares in mortgages were in fact bought and sold for a price even in situations where (as in the case of a group series of mortgages) there could have been no definite identification of land that might ultimately be involved in the transaction. . . .
>
> It is general knowledge, too, that a landowner as often as not will protect his equity by keeping a mortgage good, even when he believes that the land on forced sale would produce less than the face amount of the lien. Again, the financial responsibility of the obligor on the mortgage bond affects the question of the value of the security.

In statutory interpretation, he has declined to usurp the legislature's function by assuming to extend or limit the scope of a statute whose provisions are unambiguous. He has thus stated:

> Cases plainly outside the letter of a statute are not by construction to be brought within it merely because they are within its reason and spirit. (*Fontheim* v. *Third Avenue Ry. Company*, 281 N. Y. 392, 394).

In *Fisher* v. *Long Island Lighting Co.*, 280 N.Y. 63, the defendant utility company had discontinued the supply of electric current to the plaintiff consumer without advance notice, in disregard of a statute that proscribed the discontinuance of such service "for any cause" until after a five-day written notice to the consumer. The utility's defense was that the plaintiff had tampered with the electric meter in his house so that it did not record the current used, thereby perpetrating a fraud on the utility. The court below sustained this defense, holding that the statute in question was subject to an implied exception making its protection unavailable to one guilty of criminal or fraudulent conduct.

In an opinion reversing the judgment below, Judge Loughran stated:

> In our opinion, no such departure from the letter of the law was called for. We discern nothing whimsical or vicious in the unqualified command of this statute that a gas or electric corporation was not to discontinue the supply of gas or electric light before it gave a five-day written notice to the consumer. Perhaps that policy in the long run did justice all around. In any case, we find ourselves unable to say that common sense or moral principle necessitated an allowance to such corporations of fuller rein in passing judgment on their patrons.

Where, however, the language of the statute is such as to leave room for interpretation, he has resolved questions of construction upon consideration of the legislative history of the statute and of its basic purpose and policy.

Judge Loughran Upholds Labor Relations Act

Thus, in *Metropolitan Life Insurance Company* v. *Labor Relations Board*, 280 N.Y. 194, a case in which Judge Loughran wrote an opinion upholding the constitutionality of the New York State Labor Relations Act, a local statute similar to the National Labor Relations Act, a question of interpretation was also presented because the statute did not clearly define the types of employees subject to its provisions. Over the dissent of three of his associates, Judge Loughran rejected the narrow view that because it was enacted as part of the old Labor Law which applied only to industrial workers, the new legislation was similarly limited in scope and could not be read as applying in the case at bar to agents of a life insurance company. Giving effect to the broad principles of policy declared in the statute and "the scheme of the act as a whole", Judge Loughran concluded that it embraced "white collar" as well as industrial workers.

In the construction of contracts, he has similarly held the courts powerless to alter the plain meaning of a contract to achieve some supposed equitable result. But where the language of the contract is not explicit, he has striven to give effect to the basic understanding and object of the parties.

Thus, in *Rasmussen* v. *New York Life Insurance Company*, 267 N.Y. 129, suit was brought by the beneficiary of a life insurance policy to recover double indemnity for the accidental death of the insured caused by carbon monoxide. The policy specifically denied double indemnity for death "by poison or gas"; but a pamphlet which the insurance company had delivered to the insured with the policy, referred to death by carbon monoxide as included within the double indemnity coverage.

The court below refused to admit the pamphlet in evidence, and directed judgment in favor of the insurance company. Reversing and ordering a new trial, Judge Loughran held:

> . . . Had the excluded evidence been admitted, the jury could have found that the insured was induced to accept the policy by a clear assertion that death by carbon monoxide was not to be understood as death by poison or gas within the exception to the provision for double indemnity in the event of fatal accident. The words of exception are not so explicit that their scientific sense must be held to exclude a definite agreement that a particular situation is outside their operation.
>
> . . . If this policy was accepted on the faith of a not incongruous dictionary of its terms supplied by defendant, there is no reason for denying effect to such substantial evidence of a mutual special sense of the parties. . . .

Firmly believing in the supremacy of the law, Judge Loughran has written several opinions giving full effect to the broad public policy declared in a governing statute by denying enforcement to private transactions which, though not expressly outlawed by the statute, would clearly defeat the legislative purpose.

One of those opinions is to be found in *Tooker* v. *Inter-County Title Guaranty and Mortgage Company*, 295 N.Y. 386. That case involved a contract entered into in 1929 whereby the defendant sold to the plaintiff ten shares of the capi-

tal stock of a bank of which the defendant was the majority stockholder, in order to qualify the plaintiff to serve as a director of the bank, and the defendant agreed to repurchase such ten shares of stock whenever the plaintiff ceased to be a director, at a price not less than the sum paid therefor by the plaintiff, aggregating $5,000 for the ten shares. Resigning as a director after the bank had gone into voluntary liquidation in 1942, plaintiff brought suit for breach of said contract upon defendant's refusal to repurchase the ten shares of stock. The defense was that the contract violated the spirit of Section 116 of the State Banking Law which requires every director of a bank to be the owner, "in his own right, free from pledge, lien or charge", of at least ten shares of the bank's capital stock having an aggregate par value of not less than $1,000.

Reversing a judgment in favor of the plaintiff, Judge Loughran wrote an opinion holding that the contract in suit was unenforceable. Pointing out that the object of the statute in question was to protect the public by requiring "every director of a banking institution to share its business risks to the extent of undiluted ownership of the prescribed amount of its stock", Judge Loughran held that the contract transgressed that policy, reasoning as follows:

> Manifestly, the transaction was designed to qualify the plaintiff for election as a director of the bank. Transfer of bank stock for the purpose of so qualifying the transferee is not obnoxious to the statute. . . . But this case does not stop there. The contract in suit inevitably supplied to the plaintiff a means whereby at any time during his directorship he was equipped to free himself in a substantial degree from the chance of financial loss incident to record ownership of his qualifying shares, with the result that his sense of the character of his duty as a director may well have been reduced in like measure. Such an arrangement inherently tended to thwart the public policy declared by section 116 and, therefore, no cause of action can be founded thereon. [Citing authority].

He has written a number of opinions of importance to the protection of civil liberties and other rights of individuals.

Reverses Suspension of Lawyer

In *Matter of Clay*, 282 N.Y. 140, an attorney had been suspended from practice, among other charges, for "conduct aspersive of the administration of justice", in that he had advised the officials of a labor union, whom he represented, that they would probably be unable to obtain injunctive relief from the courts in a pending labor dispute because of the prevalent public feeling against labor. Reversing, Judge Loughran wrote:

> Such animadversions upon the nature of the judicial process are not sensational. It has been observed before that judges have at times been moved by the prejudices they share with their fellow men. Calculations made on that score do not become sinister merely because they have been whispered by a lawyer to his client. In our judgment the finding of conduct prejudicial to the administration of justice was unwarranted.

People v. *Nahman*, 298 N.Y. 95, involved a regulation of the New York City Park Commissioner which prohibited, among other acts, the holding of any meeting or delivery of any speech or exhibition of any placards, in a city park without first obtaining a permit from the commissioner. By statute, violations of the commissioner's regulations were punishable as criminal offenses. Thirteen defendants were convicted of violating the regulation in that, in March, 1946, in City Hall Park in New York City, without a permit therefor, they displayed placards critical of Winston Churchill, while Mr. Churchill was entering the City Hall for an official reception. Those defendants challenged the constitutionality of the regulation as violative of their right of freedom of expression.

Judge Loughran sustained the validity of the regulation, but only after concluding that it could not be interpreted as conferring any "unbounded power of antecedent administrative censorship" on the commissioner. If it had conferred such power, he observed, it "would obviously be void". He held that the scope of the regulation was necessarily limited by the statute on which it rested, and which restricted the jurisdiction of the Commissioner to maintenance of the beauty and utility of the City parks. The permit requirement of the regulation in question, therefore, could be given effect only insofar as it promoted that objective.

Judge Loughran observed that there was a definite need for a nondiscriminatory permit requirement, since (a) certain areas of the park system, such as children's playgrounds and horticultural gardens, were entirely unsuited for meetings or parades, and (b) even in other areas, such functions had to be so placed as to prevent damage to lawns and shrubbery, and "so scheduled in point of time and separateness as not unduly to interfere with the beneficial uses of the system by the people of the city".

It further appeared, as a matter of administrative construction of the regulation, that the commissioner never denied a permit for a meeting or other public event, but merely exercised his power to schedule and locate the affair in respect to area and time, for the convenience and protection of the general public in the use of the parks.

Construing the regulation as conferring no greater power than this, Judge Loughran held:

> The regulation, we repeat, confers no power to suppress the publication of facts or opinions. On the contrary, as we have tried to demonstrate, it is in essence a nondiscriminatory provision which has for its sole objective the safety, comfort and convenience of the people of the city in their appropriate uses of its public parks. To our minds, the regulation—so read—is a reasonable measure of local control which affects civil liberties only in an allowable minor degree. (See *Cox* v. *New Hampshire*, 312 U. S. 569 . . .).

In *Matter of Davids* v. *Sillcox*, 297 N.Y. 355, Judge Loughran wrote an opinion upholding the right of minority members of a membership corporation composed of authors, to an order requiring the corporation to

furnish them with the names and addresses of the entire membership, and rejecting as invalid a by-law purporting to keep that information from individual members. Holding that the petitioners were entitled to invoke the long-established common law remedy available to a stockholder seeking an inspection of his corporation's books and records, Judge Loughran referred to the remedy as one "that serves the democratic need for securing the interests of minorities".

Chief Judge Has Striven To Improve Civil Service

In the field of civil service, he has striven to give full implementation and effect to the policy of the requirement embodied in the New York State Constitution that appointments and promotions to the civil service be made, so far as practicable, according to merit and fitness as determined by competitive examination. Except in unusual situations where there was a compelling need for variance from the constitutional norm (*Matter of Ricker* v. *Village of Hempstead,* 290 N.Y. 1), Judge Loughran has uniformly rejected attempts by the legislature and administrative agencies to undermine that requirement by making noncompetitive appointments or promotions of civil servants (*Matter of Turel* v. *Delaney,* 285 N.Y. 16; *McNamara* v. *Holling,* 282 N.Y. 109; *Matter of Williams* v. *Morton,* 297 N.Y. 328). In one recent case, he set aside a determination of the Board of Examiners of the New York City Board of Education, which refused a teaching license to an otherwise qualified applicant on the basis of the "individual notions" of the examiners rather than of an objective standard such as is required by the state constitution (*Matter of Cohen* v. *Felds,* 298 N.Y. 235).

In criminal cases he has been an outspoken champion of the right of every defendant to a fair trial, conducted in accordance with the safeguards provided by law for the protection of defendants' rights. His approach may best be illustrated by reference to his dissenting opinion in *People* v. *Buchalter,* 289 N.Y. 181, where the Court of Appeals, by a four-to-three decision, affirmed the first-degree murder convictions of the notorious "Lepke" Buchalter and two others.

Judge Loughran and two of his associates voted to reverse the judgments of conviction because of a great number of errors committed at the trial in rulings on evidence and on objections to the prosecutor's summation, and in the trial judge's charge to the jury. Former Chief Judge Lehman, casting the deciding vote for affirmance, wrote a separate concurring opinion in which he agreed with Judge Loughran that there were numerous "errors and defects" in the case, but concluded, after frankly stated hesitation, that they could be disregarded because they could not have affected the jury's verdict.

Cogently demonstrating in his dissenting opinion the various errors at the trial, Judge Loughran declared, in part:

> We believe the foregoing combination of errors cannot rightly be looked upon as a technical defect. Of course this crime was an atrocious thing and the defendants apparently were men of past bad moral disposition. But these considerations are nothing to our purpose: it is for us to keep to the question whether the trial was fair. This last, as has so often been said, is the great requirement of this court's own function in all capital cases,—even when, as in this instance, the evil life of an accused may be an influence to warp the less responsible judgment of others. . . .

Judge Loughran has written a number of significant opinions clarifying the jurisdiction and practice of his court. He is also the author of a widely quoted opinion, in *People ex rel. Herzog* v. *Morgan,* 287 N.Y. 317, regarding the great weight to be accorded by an appellate court to the findings of the equity judge who sees and hears the witnesses. In that situation, Judge Loughran wisely observed: "the factors that made his [the trial judge's] duty clear to him can at this distance be seen by us only, as it were, through a glass darkly."

It is the good fortune of the people of New York, lawyers and laymen alike, that Chief Judge John T. Loughran still has many years of invaluable service to contribute to the jurisprudence of his state.

Bar Association Executives

(Continued from page 549)

ment by lectures, demonstrations and dissemination of literature.

2. *Money-saving.*

A. *Insurance and benefit plans.* Practicing a profession always has lacked the security of employment in a large corporation because of the various financial benefit plans made available to their employees by such firms. Most of these, however, can be made available to lawyer-members by bar associations, and they can add a great deal to the social security of the practicing lawyer.

(1) *Group hospitalization and surgery.* These are the "Blue Cross" and "Blue Shield" plans which have swept the country in recent years and are a major argument against the alleged need for socialized medical service. Any group with well-defined and stable membership may be used, and many bar associations have put these important benefits within reach of their members.

(2) *Group life insurance.* Here is a chance for otherwise uninsurable people to get life insurance and for all to get it at lower rates than they could possibly get it elsewhere.

(3) *Accident and health insurance.* Most lawyers are not as dependent upon day-to-day earnings as factory laborers, but for many of them there is a real need for an emergency income during times of physical disability. This may be purchased individually, but it can be obtained on a group basis through the bar

association on more favorable terms.

B. *Credit union.* Group savings and loan organizations known as credit unions are another advantage usually available to corporation employees which a bar association can sponsor for its members. They accept members' savings at better interest rates than are obtainable at banks, and make small loans or carry mortgages for members at lower than outside rates. Credit unions are promoted by a national association with headquarters at Raiffesen House, Madison, Wisconsin, to which address inquiries should be directed.

C. *Central purchasing.* Distribution costs account for as much as one-third to one-half of the retail price of many articles of equipment used by lawyers. A central purchasing agency established under bar association auspices could eliminate that cost and secure many kinds of merchandise for its members at wholesale prices.

D. *Printing, mimeographing and lithographing.* All lawyers have frequent need for printed, mimeographed and lithographed materials. Many associations have purchased the equipment necessary to do this work for themselves and, having it, do their members' work also, either on a cost basis or at regular commercial rates with the profits going into the association treasury.

Bar Associations Offer Professional Services

3. *Professional services.*

A. *Advance sheets.* A number of bar associations in the past ten or fifteen years have become weary of waiting for state printers to get out the opinions of their courts of last resort weeks or months after they have become the law of the land. The state bar associations of Ohio, Oklahoma, Colorado and perhaps one or two other states issue the reports while they are still warm and this service alone is worth more than those lawyers pay for their state bar membership.

B. *Bar directory.* There is a curious divergency in practice among bar associations with respect to their membership mailing list. Some of them make it top secret, and require a resolution of the board of governors before permitting any alien eye to see it. Others publish it regularly in the bar journal. There are so many of the latter that the necessity and value of the precautions taken by the former are open to question. Every May the *Michigan State Bar Journal* consists of a roster of the names of all Michigan lawyers listed alphabetically and also geographically with addresses and telephone numbers included. The telephone numbers are a wonderful convenience, and make the volume a desk piece for Michigan lawyers throughout the year. Most geographical lists are by counties. The Martindale-Hubbell classification by cities and towns would be more useful for most purposes, as there are many more occasions for referring to a lawyer in connection with his city or town than his county.

C. *Standard forms.* Commonly used legal forms have been prepared by the San Antonio Bar Association for its members at small cost. The forms are designed to improve upon forms previously in common use. They include earnest money contract, sale of real estate, warranty deed, warranty deed with vendor's lien, real estate note (vendor's lien and deed of trust), deed of trust, builder's and mechanic's lien, builder's and mechanic's note, transfer real estate note and lien; release real estate note and lien, partial release real estate note and lien, extension real estate

note and lien, collateral transfer real estate note and lien, promissory note (hand note), chattel mortgage, and chattel mortgage note. Prices to members are two and one half cents each for one-page forms and five cents each for two-page forms.

D. *Attorney and secretarial placement.* A service of genuine value to all concerned is bar association assistance in placing young lawyers in law offices. The Illinois State Bar Association has developed this to the further extent of making surveys of the need for additional lawyers in various localities and endeavoring to equalize the lawyer population throughout the state. Probably it would not be practicable for a state association to go into the matter of secretarial help, but the Akron Bar Association has made a feature of this service. It gives lawyers the advantage of being able to select from applicants previously screened by someone familiar with law office requirements and of course it saves the applicants the fees they would pay to private employment agencies.

4. *Social and miscellaneous.* One of the pleasant features of a career in the law is that a lawyer's associates in his profession are people with fairly high education and cultural attainments. The enjoyment of social contact with these people is part of the life of the lawyer. Even Shakespeare observed that lawyers "strive mightily, but eat and drink as friends", and it is a privilege and a duty of the bar association to keep these two elements in balance. There is some social contact in any bar meeting, but good bar associations occasionally put on purely social functions. The Chicago Bar Association's annual Christmas skit, "Christmas Spirits", is a gridiron takeoff on current public figures of the city, state and nation, hugely enjoyed by all that see and participate. A camera club is also part of the Chicago Bar's social program. The Association of the Bar of the City of New York exhibits the paintings of lawyer-artists, and the Association calendar in each issue of its monthly *Record* is well studded with social events.

In this connection should be mentioned membership in the Half-Century Club of the Milwaukee Bar Association, and the certificate of "Senior Counsellor" of the Illinois State Bar Association, both given in recognition of lawyers that have completed fifty years at the Bar. The California State Bar is sponsoring the writing of a history of the Bench and Bar, a project that many state and city associations might find rewarding in more ways than one.

Service to Public Is Third Phase of Work

1. *Legal aid and lawyer reference plans.* The legal profession's first and greatest service to the public is to give it proper legal advice and representation. That is its reason for existence, and all else is incidental. There are millions, however, whose legal needs are not being met, either because they think they cannot afford a lawyer, or because they are unfamiliar with lawyers and afraid of them. The legal aid bureau and the lawyer reference plan are the profession's answers to these two problems. Both are being strongly promoted by American Bar Association committees and other agencies, and a mere mention of them here is sufficient. Reginald Heber Smith, Director of the Survey of the Legal Profession, has endorsed the editorial remark of the *Michigan State Bar Journal* that "only the very smallest community can afford *not* to have such a service in one form or another".

2. *Legislative services.*

A. *Bar legislative program.* Most bar associations have, or ought to have, a committee on jurisprudence and law reform or perhaps simply a committee on legislation, the job of which is to draft and offer to the legislature proposed bills embodying the Bar's legislative program for the session. There are many phases of statute law about which only lawyers have an informed and expert opinion, and it is their public duty to draft and sponsor needed legislation from time to time in those fields.

B. *Analysis of legislation.* The State Bar of Michigan has won public approval by publishing during legislative sessions and prior to elections unbiased descriptions, analyses and summaries of arguments for and against pending legislation and constitutional proposals. These have been sent out to the press in the form of feature releases for the general information and education of the electorate and they were very widely printed.

3. *Unauthorized practice.* Just as surely as it is the lawyer's duty to do his job, it is his duty to oppose the doing of it by others that lack the qualifications necessary to do it properly. Although the fight against unauthorized practice often is thought of as a matter of lawyer self-interest, the public interest is the paramount consideration. This is a good starting point in the national bar coördination program, since, thanks to the work of the American Bar Association committee, a high degree of coöperation among local, state and American Bar Association unauthorized practice committees already has been achieved.

4. *Grievance committee.* A necessary corollary of the Bar's right to oppose the intrusion of others into its field is its duty to see that those who are admitted do their work properly. Every bar association must police its own ranks to some extent for its own protection. In the integrated states the Bar's disciplinary machinery works hand in hand with the supreme court, providing an effectual self-government which is highly salutary to the morale of the Bar.

5. *Civic and political leadership.* The professional training of lawyers involves the study of our and other forms of law and government and the history of our constitutional system and its antecedents in Great Britain. Lawyers are therefore naturally better informed than most people as to the meaning and value of constitutional government and American institutions, and they can better discern the fallacies of those who would persuade us that our system should

be discarded. Upon lawyers, therefore, rests the weighty responsibility of leading the defense of our form of government and the liberties which depend upon it. The Junior Bar public information program always has stressed these matters, and the Committee on American Citizenship is specifically charged with the American Bar Association's responsibilities in this field. State and local bar associations should put their own Junior Bars and American citizenship committees to work on it, and here are some specific projects for them to consider:

A. *School lectures.* The Bar Association of St. Louis last year arranged for a series of lectures by lawyers in each of the public schools of the city on citizenship subjects such as the Constitution, the Bill of Rights, the jury system, and others. Bar association speakers' bureaus afford additional opportunities for carrying the same message, as do also the Bar's radio and television programs and all other media, spoken or written, by which the bar association reaches the public.

B. *Naturalization ceremonies.* The granting of United States citizenship should be and is a solemn and impressive event. Most federal judges welcome bar association assistance in connection with it. Some organizations have given the newly admitted citizens American flags, copies of the Constitution and the Declaration of Independence, and other symbols of their newly acquired status.

C. *Citizenship award.* Each year the Ohio State Bar Association presents a citizenship award to a citizen of Ohio who has been outstanding in the promotion of Americanism and good citizenship during the year.

6. *Court and courthouse facilities.* The Jacksonville Bar Association (Florida) last year undertook campaigns for a new county courthouse and for a small claims court. The Association drafted the small claims court bill, sponsored its introduction in the legislature, and, when opposition developed, took the issue to the people and enlisted so much popular support for it that it passed. The new courthouse has not yet materialized, but the Association succeeded in getting an addition to the mill tax to start a fund for that purpose. The Columbus Bar Association publicly censured one court of that city and started a reform movement. The Los Angeles Bar Association has been active in plans for a new courthouse for that city. The Michigan State Bar published in its bar journal an article by a roving reporter who went around the state and photographed a dozen or more courthouse relics of the last century.

7. *Judicial referendum.* Bar associations can assist the public in deciding which judicial candidates to vote for. Most voters are ignorant of the qualifications of the candidates or of what their qualifications ought to be, and, as Chief Justice Hyde of Missouri remarked, posting a man's picture on a telephone pole sheds little light on that point. Lawyers do know, and the least they can do is make their informed opinions available to the electorate. The simplest way is to conduct a preferential plebiscite of the Bar and publicize the result. The next step is to campaign for the recommended candidates. The Cleveland Bar Association attempts to get an appraisal of the judicial qualifications of the candidates by means of an itemized questionnaire, and if none measures up to the standard it takes the further step of drafting a suitable candidate and campaigning for him. The Missouri Bar campaigns to get out the vote on the judicial ballot, and to urge reëlection of incumbent judges running under the Missouri Plan. Recommendations to the governor for interim appointments are another field of service. Ofttimes it is thankless, but the effort is worthwhile and will surely pay off in the end.

8. *Interprofessional relations.* Bar associations in various cities coöperate with the organizations of other professions in an interprofessional council which discusses problems common to all and promotes better understanding and coöperation among them.

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